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No. 00-1762

In the

Supreme Court of the United States

CM, *ETC.*, *ET AL*,

Petitioners,

v.

BOARD OF EDUCATION OF HENDERSON COUNTY, *ET AL*,

Respondents.

On Petition For Writ of Certiorari
To The Fourth Circuit Court of Appeals

BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT A PETITION FOR WRIT OF CERTIORARI REGARDING THE STATE STATUTE OF LIMITATIONS BORROWED BY THE DISTRICT COURT, WHERE THE COURT OF APPEALS RULED THAT SUCH STATUTE OF LIMITATIONS COULD NOT BE APPLIED AGAINST PETITIONERS UNDER THE FACTS IN THESE CASES.

II. WHETHER THE MULTIPLE FEDERAL POLICIES UNDERLYING THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) HAVE BEEN BALANCED CONSISTENT WITH THE ACT, WHEN A STATE LEGISLATURE REQUIRES AN AGGRIEVED PARTY, WHO HAS RECEIVED WRITTEN NOTICE OF A FINAL SPECIAL EDUCATION DECISION MADE BY SCHOOL AUTHORITIES ALONG WITH CLEAR NOTICE OF THE PROCEDURES AND TIME LIMIT FOR CONTESTING THAT DECISION, TO FILE A REQUEST FOR AN ADMINISTRATIVE DUE PROCESS HEARING WITHIN 60 DAYS OF RECEIPT OF SUCH NOTICE IN ORDER TO PRESERVE THE RIGHT TO CONTEST THE DECISION.

LIST OF PARTIES

In the consolidated appeals decided by the Fourth Circuit, the parties were:

Petitioners in this Court

CM, a minor, by and through her parents, JM and EM, and on their own behalf (Plaintiffs-Appellants) in 99-2533

M.E. and P.E., on their behalf and on behalf of their son, C.E. (Plaintiffs-Appellants) in 00-1101

Respondents in this Court

The Board of Education of Henderson County *et al.* (Defendants-Appellees) and The State of North Carolina (Intervenor-Appellee) in 99-2533

The Buncombe County Board of Education (Defendant-Appellee) and The State of North Carolina (Intervenor-Appellee) in 00-1101

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Board of Education of Henderson County, Buncombe County Board of Education, and The State of North Carolina respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is reported at 241 F.3d 374 and is reprinted in Petitioners' Appendix at A-1 through A-29. The opinion of the district court in *CM v. Board of Educ. of Henderson County* is reported at 85 F. Supp. 2d 574 (W.D.N.C. 1999) and is reprinted in Petitioners' Appendix at A-30 through A-70. The opinion of the district court in *M.E. v. Buncombe County Bd. of Educ.* is reported at 88 F. Supp. 2d 493 (W.D.N.C. 1999) and is reprinted in Respondents' Appendix at 1a through 14a. The opinion of the Administrative Law Judge in *CM* is unpublished and is reprinted in Petitioners' Appendix at A-71 through A-106. The opinion of the Administrative Law Judge in *M.E.* is unpublished and is reprinted in Respondents' Appendix at 15a through 25a. The unpublished hearing review officers' decisions in both cases are reprinted in Respondents' Appendix at 27a through 83a.

STATEMENT OF THE CASES

A. Factual and Administrative Background of *CM*

CM was diagnosed with autism at approximately age two. In June 1993, when CM was three years old, her parents moved the family to Hendersonville, North Carolina to take advantage of services from "TEACCH" (Treatment and Education of Autistic and Related Communication in Handicapped Children) -- a nationally renowned program for autistic students and their families developed at the University of North Carolina. In August 1993, the parents enrolled CM in a TEACCH preschool classroom in the Henderson County Schools.

CM's individualized education program (IEP) developed by the parents and school staff called for a full-day program; however, her parents only brought CM for half a day for the brief time she was enrolled in the TEACCH preschool. At this same time the parents read about the Lovaas program, a treatment approach that professes to achieve "recovery" from autism. The Lovaas program involves highly regimented one-on-one instruction in the home for 40 hours per week. In November 1993, the parents removed CM from the Henderson County Schools to begin Lovaas treatment. They did not express discontent with the TEACCH program or indicate that the school system program was not appropriate, but stated they believed that the Lovaas approach was highly successful.

Over a year later, in December 1994, CM's father contacted school personnel to request that the school system begin paying for the home-based Lovaas program. Since the school system had not worked with CM for over a year and her IEP was now out of date, federal law required that an IEP team be convened to develop a new plan and decide the appropriate placement for CM. A series of

meetings was held over the next two months with a final IEP meeting on February 15, 1995. The IEP team considered four options: the parents' program and three different school-based programs. With the exception of the parents, the IEP team recommended that CM be served in a full-day program for autistic students with some mainstreaming in a regular kindergarten class. The parents continued to insist upon reimbursement for their Lovaas program.

The Director of Exceptional Children's Programs sent the parents a letter the day after the final IEP meeting. She acknowledged the disagreement between the parties and detailed the rationale for the team's decision. She also enclosed a *Handbook on Parents' Rights* which details the process for challenging the IEP team decision, including a clear statement of the 60-day statute of limitations for initiating a "due process" hearing. The Director explained that the parents could seek mediation or pursue a due process hearing in light of their disagreement with the school system's offer of services.

The parents initially requested mediation but later declined to schedule it. They also did not pursue a due process hearing. They did request an independent evaluation at school system expense. The Director proposed that the school system perform an evaluation first and explained that the parents would be entitled to an independent evaluation if they disagreed with the results.

The school evaluation was completed and reviewed with the parents in October 1995. At the school system's initiative, the parents and school met in November 1995 to begin developing an IEP to replace the one that would soon expire in January 1996. The parents' Lovaas consultant reviewed the IEP drafted by the school staff based on the recent evaluation results. The consultant reported

that CM had already mastered many of the goals and objectives proposed in the IEP. This claim was not supported by CM's recent testing, however.

In December 1995, the parents renewed their request for an independent educational evaluation, stating that the evaluation conducted by school personnel was insufficient. The Director agreed that the parents could pursue an independent evaluation and they would be reimbursed up to $1200 (the school system's maximum amount for independent evaluations). School personnel and the parents agreed to postpone the development of the 1996-97 IEP until the independent evaluation was completed.

After rejecting all of the independent evaluators on the school system's list, in the spring of 1996, the parents selected Dr. Jan Handleman, an educator and professor with Lovaas experience in New Jersey. Dr. Handleman conducted no formal testing of CM. Because Dr. Handleman's report provided no information on CM's present level of educational performance -- a necessary element for the development of an IEP -- and because the parents and their Lovaas consultant had both indicated that CM had mastered many of the goals and objectives on the proposed IEP, the Director sought the assistance of Dr. Victoria Shea, an expert in autism, to informally assess CM in order to provide information for IEP development.

Dr. Shea completed her observation report in May and recommended that IEP goals be written in several specific areas. She found that the skills CM had "mastered," according to her parents and Lovaas consultant, had not been mastered in the school environment. Due to the conflicting statements regarding CM's present level of performance, school personnel conducted additional observations and informal assessments, and met again with CM's

mother in an effort to gather more information about CM's present level of performance prior to the development of the IEP.

The parents postponed an IEP meeting scheduled for June, because they would not grant permission to school personnel to conduct the testing recommended by Dr. Shea. They chose to have the testing administered privately by Dr. Thomas Boyle, a private psychologist in New Jersey who had worked with Dr. Lovaas. Dr. Boyle admitted that he deviated from standard protocol in administering the tests in order to try to elicit a response from CM. Dr. Boyle conducted an intelligence test of CM but, at the parents' request and contrary to his normal practice, he did not report the score. At the hearing it was revealed that after over two years of Lovaas therapy CM scored in the mildly mentally handicapped range. According to the Lovaas study one criterion for "recovery" is achieving an IQ in the normal range after two to three years in the program. In the summer of 1996 CM was not showing signs of "recovery."

School personnel and the parents met in August 1996 to begin developing the IEP based on the evaluation reports, the observations, and the parents' input regarding CM's progress in her home program. A subsequent IEP meeting was held in mid-September at the parents' request so that their Lovaas consultant could attend. Although the parents and consultant did not reveal this during the IEP meetings, at this time CM was displaying significant aggressive behaviors at home in addition to at school. Also the home logs revealed the mother's concern that CM had "forgotten a lot of information. Much of what she learned was never generalized completely." In addition, a questionnaire completed by CM's preschool teachers at the mother's request showed that many of the skills that the Lovaas therapist claimed CM had mastered in

December 1995 were still a problem for CM at the end of the 1995-96 school year.

At a final IEP meeting on September 23, 1996, the parents and school personnel all agreed that the goals and objectives on the IEP were appropriate. The parents continued to request that the school system pay for their home Lovaas program. Both parents testified that the only program they would have accepted for CM was the Lovaas program. School personnel considered the parents' request but believed that the school system's proposed program was more appropriate. The school staff were concerned that the home program was too intensive, requiring that CM undergo therapy for more than 40 hours a week. They also believed that the constant one-on-one instruction caused CM to become too dependent on adults and that CM's social and communication skills were not being effectively developed.

Petitioners filed a petition for a contested case in the Office of Administrative Hearings on November 1, 1996, claiming that Respondent Henderson County Board of Education (HCBE), violated the requirements of IDEA, by failing to offer an appropriate educational program to CM from November 1993 to the present. Petitioners sought reimbursement for the cost of their in-home program and part-time private school services provided to CM from November 1993 through the 1996-97 school year.

The administrative law judge (ALJ) granted Respondent's motion for summary judgment on all of Petitioners' procedural and substantive claims prior to the development of the 1996-97 IEP based on a failure to file these claims within the statutory limit and laches. An 18-day trial was conducted before another ALJ in the spring of 1997. The judge entered a final decision on December 11,

1997, concluding that HCBE's proposed IEP for 1996-97 was appropriate.

Petitioners appealed to the State Review Officer (SRO). The SRO entered a decision on March 4, 1998, concluding that the Henderson County Schools had offered CM a free and appropriate public education and affirming all prior decisions of the ALJs.

B. Disposition of *CM* in the District Court

On April 3, 1998, Petitioners filed a 50-page complaint in federal district court seeking to overturn the decisions of the ALJ and SRO and claiming violations of the Americans with Disabilities Act (ADA), § 504 of the Rehabilitation Act and § 1983 of the Civil Rights Act and seeking a review of the educational programs for the 1997-98 and 1998-99 school years.

The district court dismissed Petitioners' entire complaint in an Order dated January 4, 1999. However, after reconsideration and by Order dated March 9, 1999, the Court *sua sponte* vacated the January 4, 1999 decision as erroneous as a matter of law and established a timetable leading to a plenary hearing on May 14, 1999, at which the parties were given an opportunity to address all pre-trial motions before the Court.

On June 15, 1999, the district court entered a new Order dismissing: Petitioners' claims under § 504, the ADA and § 1983; all Petitioners' claims against individual defendants; and Petitioners' IDEA claims for the 1997-98 and 1998-99 school years. The court also affirmed the decisions of the ALJ to dismiss the IDEA claims for the 1993-94, 1994-95, and 1995-96 school years.

The district court entered a final Order on October 12, 1999, dismissing Petitioners' only remaining claim, the IDEA claim regarding the 1996-97 school year. In this October 12, 1999 Order, the court affirmed the decisions of the ALJ and SRO, concluded that HCBE offered CM a free appropriate public education for the 1996-97 school year, and dismissed Petitioners' entire complaint with prejudice.

C. Factual and Administrative Background of *M.E.*

P.E. and M.E. moved to Buncombe County, North Carolina in 1995. However, they did not inform the school system that they were residing within the system until March 1, 1996. In order to continue C.E.'s Lovaas therapy, a therapist from Baltimore, Maryland accompanied the family to Buncombe County. C.E.'s therapy was administered by the therapist for 30 to 35 hours a week, 50 weeks a year.

In his first correspondence with Respondent Buncombe County Board of Education ("Buncombe County Schools" and "school system"), P.E., the father of C.E. and the attorney of record in the administrative proceedings below, did not request special education services for C.E. Instead, P.E. requested "reimbursement" for on-going therapy services. The Buncombe County Schools treated P.E.'s initial letter as a referral for special education services.

Over the next year and a half, Buncombe County Schools offered P.E. and M.E. numerous individualized education plans for C.E. In May of 1996, the school system offered a program of at least 20 hours per week of direct special education including one-on-one instruction. Yet, the only program acceptable to the Petitioners was Lovaas. In fact, M.E. stated that she would reject a program

with a comparable amount of in-home, one-on-one instruction based on the TEACCH method.

In February of 1997, school officials wrote to the parents asking them to notify Buncombe County Schools if the individualized education plan already given for C.E. was acceptable because additional personnel would be needed to implement the program. The parents never responded and no negotiations between the parents and Buncombe County Schools regarding services took place after February of 1997.

On June 12, 1997, C.E.'s IEP team determined that he no longer qualified for services. Team members and M.E. and P.E. agreed with the decision and another attorney who accompanied the parents to the meeting was given a copy of the *Handbook on Parents' Rights* containing notice of North Carolina's 60-day statute of limitations for filing due process petitions in the Office of Administrative Hearings (OAH). Although the parents later alleged C.E. was denied an appropriate education from March of 1996 until June of 1997, they never instituted proceedings to challenge the school system's proposed program during the time period when C.E. was eligible to receive services.

On July 29, 1997, P.E. wrote the school system another letter demanding reimbursement for the cost of C.E.'s therapy. He concluded, "[i]f you have not provided a written response to me within ten days from the date of this letter, we will immediately proceed to a due process hearing." In response, the attorney for Buncombe County Schools wrote to P.E. on two separate occasions: on August 7, 1997 to inform P.E. of changes in the notice requirements to schools under IDEA, and on August 8, 1997 to make a counteroffer thereby rejecting the July 29, 1997 demand. P.E. never responded to the August 8, 1997 letter and he filed for due

process on April 22, 1998, 257 days after his settlement demand had been rejected. To file the petition on behalf of C.E., P.E. completed a one-page form provided by OAH and attached a copy of his July 27, 1997 letter.

As of the August 8, 1997 date of the school system's rejection of his demand, P.E. had actual knowledge of North Carolina's 60-day statute of limitations for filing due process petitions under IDEA. P.E. is the attorney of record in the *CM* case, and by order dated March 24, 1997, the ALJ in that case dismissed certain claims asserted by the parents for failure to meet the 60-day statute of limitations. Following a hearing on the school system's motion for summary judgment, the ALJ in *M.E.* ruled that P.E. had actual knowledge and written notice of the 60-day time limit and failed to comply. The ALJ dismissed the petition in its entirety. Remarkably, in the parents' principal brief before the Fourth Circuit, P.E.'s attorney represented to the court that if M.E. and P.E. had known about the 60-day statute P.E. would have filed within the time allowed.

D. Disposition of *M.E.* in the District Court

On December 17, 1999, the district court issued its opinion in *M.E.* on cross motions for summary judgment and dismissed the action due to the parents' failure to file their original petition in the first-tier state administrative process under IDEA within the prescribed time limit. In the district court action, the only factual issue for resolution was whether the parents had timely filed for due process.

After ruling that the petition was not timely filed, the court discussed the parents' argument that a 60-day statute of limitations is too short and conflicts with the purposes underlying the IDEA.

Since IDEA does not contain a statute of limitations, the court ruled that the 60-day statute applied by the ALJ was the most analogous State statute. The court then ruled that application of the statute did not conflict with the purposes underlying IDEA and that a 60-day filing period is not so prohibitively short within the context of administrative due process that it undermines the ability of parents to protect their disabled children's educational rights. Moreover, school systems do have a legitimate interest in the speedy resolution of disputes in order to ascertain the necessary expenditure of funds for all students. Although not dispositive, the court stated that the father, P.E., was an attorney who purported to specialize in education law and the parents were represented throughout the entire proceedings, including negotiations for services and settlement discussions. Finally, the district court held that dismissal was within the discretion of the ALJ because Congress left to the States the procedural mechanism for compliance with IDEA.

E. Decision of the Fourth Circuit Court of Appeals

Both sets of Petitioners appealed to the Fourth Circuit. On June 13, 2000, the court granted the motion of The State of North Carolina to intervene in *M.E.* On June 14, 2000, the court granted the motion of The State of North Carolina to intervene in *CM*. On July 11, 2000, the Fourth Circuit Court of Appeals set the instant cases for oral argument *in seriatim* and on December 22, 2000, the court consolidated the cases for further action.

In a single opinion issued on February 21, 2001, a Fourth Circuit panel held that the 60-day statute of limitations borrowed by the district court was consistent with the federal policies behind the IDEA and did not frustrate its goals. However, the court found in favor of these Petitioners and ruled that neither set of them had been

properly notified of a final decision by the school system rejecting their requests for reimbursement. Therefore, the 60-day statute of limitations at issue had not been triggered and did not apply to either case. The Court of Appeals remanded the case for further proceedings consistent with its holding. Rather than take advantage of the decision in their favor and have their cases heard on remand, Petitioners petitioned this Court for certiorari on an issue which is not in controversy in these cases and has no bearing on their ability to have their cases decided on the merits.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court should deny the Petition for a Writ of Certiorari because there is no case or controversy involving these Petitioners at this time. The court below did not apply North Carolina's statute of limitations against Petitioners based on its strict application of State notice requirements. Thus, these Petitioners are not aggrieved. In the alternative, review by this Court is not warranted on the basis of a purported split in authority. The Fourth Circuit's ruling is not in conflict with the Eighth Circuit's decision, the only case cited by Petitioners for this proposition. Nor is the ruling in conflict with any relevant decisions of this Court or with federal IDEA policy. As the Fourth Circuit's ruling was proper in all respects, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I. PETITIONERS ARE NOT AGGRIEVED, FOR THE REASON THAT THE CHALLENGED STATUTE WAS NOT APPLIED TO THEM.

Article III of the United States Constitution requires that the jurisdiction of the United States Supreme Court be limited to actual

cases or controversies. U.S. CONST. art. III, § 2. Article III further denies federal courts the "power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413, 415 (1971). Additonally, this Court has offered that in order to meet the case or controversy requirement of Article III, the party invoking the jurisdiction of this Court must have standing to bring the matter before the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 363-64 (1992).

There are three elements an aggrieved party must meet to establish the minimum constitutional standing requirements:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61, 112 S. Ct. at 2136, 119 L. Ed. 2d at 364 (citations omitted). A party seeking remedial action from this Court must have suffered the specific injury he seeks to have redressed by this Court. *See Virginia v. American Bookseller's Ass'n, Inc.*, 484 U.S. 383, 392, 108 S. Ct. 636, 642, 98 L. Ed. 2d 782, 793 (1988).

As a result of the Fourth Circuit's conclusion that the Petitioners in both cases were not properly notified of the school

system's conclusive decision regarding reimbursement of educational expenses, the 60-day statute of limitations does not bar Petitioners from litigating the merits of their case in the proper federal district court or administrative forum. In light of this holding Petitioners are now free to bring their claims for reimbursement, thereby ensuring that they have their cases heard on the merits. With this procedural bar removed, Petitioners cannot now argue that they have sustained a concrete and particularized harm as a result of the 60-day statute of limitations period. There is no form of redress that this Court may now provide to Petitioners that they have not already received from the Fourth Circuit Court of Appeals.

If this Court were to render an opinion in this matter, despite the fact that these Petitioners have not sustained an injury in fact, it would be an advisory opinion. This Court has made it clear that a request for an advisory opinion from a federal court, such as Petitioners make to this Court, does not present a justiciable issue. In *Barr v. Matteo,* 355 U.S. 171, 78 S. Ct. 204, 2 L. Ed. 2d 179 (1957), the Court stated:

> [A]n advisory opinion cannot be extracted from a federal court by agreement of the parties, . . . and no matter how much they may favor the settlement of an important question of constitutional law, broad considerations of appropriate exercise of judicial power prevent such determinations **unless actually compelled by the litigation before the Court.** . . . Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute **before it effectively and presently impinges** on such claims.

Id. at 172, 78 S. Ct. at 205-06, 2 L. Ed. 2d at 181 (emphasis added) (citations omitted) (internal quotation marks omitted) (citing *Eccles*

v. Peoples Bank, 333 U.S. 426, 432, 68 S. Ct. 641, 645, 92 L. Ed. 784, 789 (1948)). Because there is no actual live controversy or an injury in fact arising from the 60-day statute of limitations, the Petition should be denied.

II. THERE IS NO CONFLICT IN THE CIRCUIT OPINIONS AND THE CHALLENGED STATUTE COMPORTS WITH EXISTING LAW AND POLICIES UNDER IDEA.

A. The Fourth Circuit's ruling is not in conflict with *Birmingham by Birmingham v. Omaha School District*, 220 F.3d 850 (8th Cir. 2000), or with any relevant decision of this Court.

1. Unlike *Birmingham*, these cases concern the time period for initiation of an administrative hearing.

The filing period at issue here is the time for initiating an administrative due process hearing. In these cases, the court upheld the limitations period specifically adopted by the North Carolina General Assembly for the initiation of due process before the State's Office of Administrative Hearings (OAH) pursuant to IDEA. The "petition" required to begin due process in North Carolina is a one-page document that can be mailed to OAH. IDEA requires the States to provide such a hearing for parents who disagree with a school decision about a child's special education. 20 U.S.C. § 1415(f).[1] The Eighth Circuit's opinion in *Birmingham*, on the other hand, established the appropriate limitations period for filing of

[1] All reference to IDEA in this Brief are to the reauthorized Act of 1997.

original action in federal district court in Arkansas *following* the exhaustion of State administrative remedies. 20 U.S.C. § 1415(i)(2).

Since Congress has elected in IDEA not to legislate the time limit for either type of filing, it is not surprising that, when looking to the procedural law in the various states for the most analogous State statutes of limitation, federal courts have borrowed limitations periods of different lengths. It is likewise unremarkable, let alone indicative of a circuit conflict, that limitations period borrowed by the Fourth Circuit for an administrative hearing in North Carolina differs in length from a limitations period borrowed by the Eighth Circuit for a judicial filing in Arkansas. Such differences exist whenever federal courts must "borrow" from analogous State procedures, given the variety among the States. As in the present case, such differences usually do not reflect actual conflicts.

2. Unlike the procedures of the shorter Arkansas statute rejected by the Eighth Circuit Court of Appeals in *Birmingham*, the standard of review, scope of review and evidentiary procedures for a due process hearing in North Carolina are all consistent with IDEA.

The issues for due process under North Carolina law are: 1) the identification of a child with special needs; 2) the appropriateness of an IEP; 3) the implementation of an IEP; and 4) all other issues relating to whether or not the child is receiving a free, appropriate education. N.C.G.S. § 115C-116(c).[2] Discovery is

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[2] All references to the North Carolina General Statutes are to the 2000 compilation of the State code. The 60-day statute of limitations in its

permitted prior to a hearing on the merits, and the ALJ rules on all issues without limitation. N.C.G.S. § 115C-116(c) and § 150B-28. The scope of review for due process under North Carolina law and is *de novo*.

The Eighth Circuit panel in *Birmingham* rejected a 30-day statute of limitations for judicial review borrowed by the lower court from the Arkansas Administrative Procedures Act because the "AAPA is not closely analogous to the IDEA." Unlike North Carolina law pertaining to administrative actions pursuant to IDEA, review under the Arkansas APA is limited to a review of the agency record without additional discovery, and the relief available is limited to affirming, reversing or modifying the State agency's actions. *Birmingham*, 220 F.3d at 854.

The North Carolina Administrative Procedure Act (APA) establishes a 60-day statute of limitations for contested case filings by aggrieved parties receiving notice of an agency decision and written notice of that time limit. N.C.G.S. § 150B-23(f). The North Carolina General Assembly has expressly adopted this statute of limitations for disputes regarding the provision of educational services to students with disabilities. N.C.G.S. § 115C-116(d). The Fourth Circuit upheld that limitations period, emphasizing that North Carolina "courts would not countenance any departure from, or relaxation of, statutory [notice] requirements." Pet. App. at 20.

The current version of the North Carolina APA contains one basic statute of limitations: "Unless another statute or **federal statute** or **regulation** sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days." N.C.G.S.

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present form has applied in North Carolina for more than 10 years.

§ 150B-23(f) (emphasis added).[3] Thus, if IDEA contained a limitations period for due process filings, North Carolina would use that period. In enacting the IDEA, however, Congress elected to be silent on the issue. In fact, Congress explicitly delegated to states the obligation to develop an administrative hearing process and submit a compliance plan to the Department of Education for approval. North Carolina, unlike many other states, has adopted a directly applicable statute of limitations for IDEA administrative claims pursuant to its delegated authority from Congress and under the supervision of the federal agency charged with monitoring dtate compliance with federal law.[4]

That IDEA does not contain a statute of limitations, 20 U.S.C. § 1415(e)(2), is not unusual. "Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action. When that occurs, '[w]e have generally concluded

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[3] Respondents note that the North Carolina 60-day statute is **longer** than many limitation periods now engrafted onto the IDEA by federal case law from those (see cases in note 3). In addition, other grievants in N.C. administrative proceedings have **shorter** time limits for filing contested cases. For example, personnel and employment-related contested cases heard in the Office of Administrative Hearings have a 30-day statute of limitations. N.C.G.S. § 126-38 (applying to career employees) and § 126-7.2 (applying to non-career employees and applicants). This 30-day limit also applies to certain cases involving disability discrimination in employment, *e.g.*, N.C.G.S. §§ 126-34.1(a)(2), -34.1(b)(3), -36.

[4] *Compare* 20 U.S.C. § 1412(a) (stating that "[a] state is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets" *with* § 1415(f) "Impartial Due Process Hearing" (requiring that parents "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, **as determined by State law or by the State educational agency.**") (emphasis added).

that Congress intended that the courts apply the most closely analogous statute of limitations under state law.'" *Reed v. United Transp. Union*, 488 U.S. 319, 323, 109 S. Ct. 621, 625, 102 L. Ed. 2d 665, 673-74 (1989) (citation omitted). In the context of IDEA actions, courts have stressed that borrowing a limitations period is mandatory. "[F]ederal courts **must** adhere to the 'borrowing' doctrine, which **requires** a federal court to borrow from the state the most analogous state statute of limitation." *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 386 (4th Cir. 2000) (emphasis added).

The Fourth Circuit properly employed a two-step analysis in evaluating the most appropriate statute of limitations for borrowing in this case, with some appropriate deference shown to the State. Pet. App. at 22. Once a court has selected the most closely analogous state cause of action, the second step requires a court to "defer [under principles of federalism] to the state's judgment about how to balance the need to enforce the statute with the need to weed out stale claims, by borrowing the statute of limitations for the most closely analogous state cause of action, unless that statute would frustrate the purposes of the federal statute on which the claim is based." *Aaron v. Brown Group, Inc.*, 80 F.3d 1220, 1223 (8th Cir.), *cert. denied*, 519 U.S. 950, 117 S. Ct. 361, 136 L. Ed. 2d 252 (1996). "[B]y adopting the statute [of limitations] governing an analogous cause of action under state law, **federal law incorporates the State's judgment** on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Janzen v. Knox City Bd. of Educ.*, 790 F.2d 484, 489 (6th Cir. 1986) (emphasis added) (citing *Wilson v. Garcia*, 471 U.S. 261, 271, 105 S. Ct. 1938, 1944, 85 L. Ed. 2d 254, 263 (1985)).

As noted by the Fourth Circuit, "[l]ogic virtually compels the conclusion that a state special education statute, specifically enacted to comply with the IDEA, like N.C. Gen. Stat. § 115C-116, constitutes the state statute most analogous to the IDEA." Pet. App. at 12. That same statute provides to parents a due process hearing on the widest conceivable variety of issues including the identification or misidentification of a child as a child with special needs; the appropriateness of a child's IEP; the failure to implement an IEP; and the denial of an appropriate education. N.C.G.S. § 115C-116(c) and (e). This wide scope of review under North Carolina's statute further distinguishes this case from *Birmingham*, in which the scope of review under Arkansas law.

This case is also distinguishable on the bases of standard of review and evidence before the reviewing administrative officer. Unlike the hearing provided for by the judicial review statute rejected in *Birmingham*, the due process hearing in North Carolina is not only a *de novo* review as to a broad variety of special education issues but it is also a full evidentiary trial. N.C.G.S. §§ 115C-116(d); 150B-25(c) and (d) (opportunity to present evidence, cross-examine any witness, submit rebuttal evidence); 150B-27 (subpoenas of witnesses); 150B-28 (depositions and full discovery under the standard rules of civil procedure); 150B-29 (documentary evidence a part of the record); and 150B-33 (conduct of pre-trial matters and hearings).

B. The Fourth Circuit's ruling is consistent with the decisions from many other federal courts analyzing fundamental IDEA policies.

The Fourth Circuit correctly found North Carolina's scheme consistent with IDEA. Pet. App. at 13-22. North Carolina is in the mainstream in utilizing its own APA as the source of the limitations

period, as is abundantly illustrated by other federal cases. In determining the most analogous limitations period for purposes of filing judicial actions under the IDEA, for example, numerous federal courts similarly "have concluded that the state administrative procedure laws are most analogous to the federal claims possible under IDEA and that the 'short' limitations periods found within such laws are **consistent with the IDEA's goals of prompt resolution** of disputes over the education of children with disabilities."[5] Although the borrowed short time periods for IDEA

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[5] *See, e.g., Birmingham,* 17 F. Supp. 2d at 863 (applying Arkansas' 30-day period) (citing *Cleveland Heights-University Heights City Sch. Dist. v. Boss,* 144 F.3d 391, 396-97 (6th Cir. 1998) (applying Ohio's 45-day statute), *aff'd in part and rev'd in part,* 220 F.3d 850 (2000)(preferring a longer statute under its facts); *Zipperer v. School Bd. of Seminole County,* 111 F.3d 847, 850-52 (11th Cir. 1997) (saying in dicta it would likely adopt 30-day period for appeal in administrative proceedings); *Livingston Sch. Dist. v. Keenan,* 82 F.3d 912, 914-15 (9th Cir. 1996) (applying Montana's 30-day limitation); *Powers v. Indiana Dep't of Educ.,* 61 F.3d 552, 554-59 (7th Cir. 1995) (applying Indiana's 30-day period); *Amann v. Town of Stow,* 991 F.2d 929, 931-34 (1st Cir. 1993) (applying Massachusetts' 30-day limit); and *Adler v. Education Dep't of N.Y.,* 760 F.2d 454, 455-60 (2d Cir. 1985) (applying NY's 120-day statute)). *See also Providence Sch. Dep't v. Ana C.,* 108 F.3d 1 (1st Cir. 1997) (applying Rhode Island's 30-day statute); *Dell v. Board of Educ.,* 32 F. 3d 1053, 1060 (7th Cir. 1994) (applying Illinois 120-day statute); *Spiegler v. District of Columbia,* 866 F.2d 461 (D.C. Cir. 1989) (applying 30-day statute); *Department of Educ. v. Carl D.,* 695 F.2d 1154 (9th Cir. 1983) (30 days); *L.C. and K.C. v. Utah State Bd. of Educ.,* 57 F. Supp. 2d 1214 (D. Utah 1999) (30 days); *Wagner v. Logansport Community Sch. Corp.,* 990 F. Supp. 1099 (N.D. Ind. 1997) (30 days); *Berkowitz by Berkowitz v. New York City Bd. of Educ.,* 921 F. Supp. 963 (E.D.N.Y. 1996) (120 days); *Herbert v. Manchester,* 833 F. Supp. 80 (D.N.H. 1993) (30 days); *Wills v. Ferrandino,* 830 F. Supp. 116 (D. Conn. 1993) (45 days); *Elizabeth K. v. Warrick County,* 795 F. Supp. 881 (S.D. Ind. 1992) (30 days); *Gertel v. School Comm.,* 783 F. Supp. 701 (D. Mass. 1992) (30 days); *I.D. v. Westmoreland Sch. Dist.,* 788 F. Supp. 632 (D.N.H. 1991) (30 days); *Bow Sch. Dist. v. Quentin W.,* 750 F. Supp. 546 (D.N.H. 1990) (same); *Thomas v. Staats,* 633 F. Supp. 797 (S.D. W. Va. 1985) (120 days).

filings in court range from 30 to 45 to 120 days (*see* note 5), such inconsistency arises directly from the congressional decision not to legislate a uniform statute of limitations for the IDEA.

Finally, Congress is presumed to be aware of federal case law as it impacts on the interpretation of federal statutes. And in re-authorizing IDEA in 1997, without adding a statute of limitations to the Act, Congress implicitly approved the numerous holdings regarding short statutes of limitations. The courts have also noted that such surface "'inconsistency [is] probably attributable to the fact-based analysis and the variety of state causes of action to evaluate.'" *S.V. v. Sherwood Sch. Dist.*, 75 F. Supp. 2d 1153, 1158 (D. Or. 1999) (quoting *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 231 n.4 (9th Cir. 1993)).

C. The Fourth Circuit's ruling properly considers and attempts to account for all relevant federal policies, rather than one single policy.

North Carolina's 60-day time period for filing a due process petition is clearly consistent with federal policies under the IDEA, as repeatedly underscored in the case law deemed by the Fourth Circuit to be "[t]he better-reasoned cases." Pet. App. at 16. As observed by the court below, "[t]he Act's intent would obviously be thwarted if placement decisions were not carried out until after a child could benefit from those placements." Pet. App. 13-14.

Petitioners assert that certiorari should be granted "to correct the misapplication of the unconscionably short statute of limitations which clearly undermines the underlying policy of the IDEA." Pet. at 15. First, the Fourth Circuit did not apply the 60-day statute in these cases (*see* Argument I). Second, there is no single policy

underlying IDEA, and the various policies are in some tension. The Fourth Circuit's opinion scrupulously examined the important interests served by IDEA, Pet. App. at 13-16, as well as the resulting policy tensions, and correctly concluded on balance that North Carolina's due process scheme is consistent with the IDEA.

Some cases, it is true, emphasize promptness in decision-making as the paramount consideration in selecting the most analogous limitations period. There is virtue in that emphasis, as long as it is understood to be non-exclusive. Promptness is indeed important, as recognized by the Seventh Circuit:

> [T]o succeed in safeguarding the student, the IDEA's policies encourage the **prompt,** rather than protracted, resolution of disputes concerning the disabled student's education. *See* 121 Cong. Rec. 37416, 94th Cong., 1st Sess. (Nov. 19, 1975) (statement in final Senate debate by Senator Williams, the principal author of the bill, stating that delay in resolving education matters is detrimental to the development of a handicapped child). The statute establishes **expeditious** administrative reviews: a due process hearing conducted within 45 days of the request, and a review of that decision within 30 days of the request. *See* § 1415(b) & (c); 34 C.F.R. § 300.512(a) & (b). . . . Moreover, because delay in the resolution of any proceedings brought under § 1415 can delay a change in the child's educational program, *see* 20 U.S.C. § 1415(e)(3), n 17, a **short limitations period is consistent** with the **IDEA's goal of prompt resolution of disputes and proper placement** of the child.
>
> . . . Congress quite clearly intended that "**all hearings and reviews** conducted pursuant to [the IDEA] **be**

> **commenced** and disposed of as **quickly** as practicable." 121 Cong. Rec. 37416 (1975) (statement of the legislation's principal author, Senator Williams). The IDEA clearly reflects a goal of **avoiding delay** in resolving education questions and in meeting the educational needs of the disabled child.

Dell v. Board of Educ., 32 F.3d 1053, 1060 (7th Cir. 1994) (emphasis added).

One reservation about borrowing "short" statutes of limitations which appears in a handful of IDEA cases is a concern that unrepresented parties might be disadvantaged or otherwise unprotected against default on the ground of a procedural technicality such as a short limitations period of which they "may be unaware." *Schimmel v. Spillane*, 819 F.2d 477, 482 (4th Cir. 1987) (adding that it was "not clear" to the court, from its reading of the predecessor statute to IDEA, that the Act imposed a duty to give notice to parents of the applicable statute of limitations). However, in North Carolina the 60-day limitation period only applies if the grievant is given written notice thereof. N.C.G.S. § 150B-23(f). And, finding that Petitioners did not have such notice, the Fourth Circuit held this statute of limitations could not be invoked against them under the facts in these two cases. Pet. App. at 29.

Other cases evincing concern over a short limitations period have stressed another federal policy, that of parent participation in educational planning. Nothing about North Carolina's 60-day limitations impedes that important participation or a parent's right to contest **any** school decision regarding identification, the appropriateness of an IEP, the implementation of an IEP or an educational program, made at any stage in the process of evaluating, determining eligibility, developing IEPs, placing the child, or reviewing problems with services for the child as they arise.

Parents themselves must recognize the importance of providing the earliest possible, undelayed services to children with special needs, which is a clear theme in the congressional history. *See, e.g.*, remarks of Senator Schweiker ("much more could be done at an earlier age to ameliorate, alter, or develop skills to compensate for, certain handicapping conditions") at 121 Cong. Rec. 19504 (June 1975). By means of its 60-day statute, the State of North Carolina has made the considered judgment that disabled children's education rights are best protected when decisions are made as promptly as possible with respect to the appropriateness of an IEP offered by a school district. That judgment is supportable because IDEA is, when all is said and done, most about the proper educational placement of each eligible child.

A shorter limitations period clearly serves the goal of resolving disputes "while a remedy is still available" within the school district's purview and before the child might lose ground. *Gertel v. School Comm. of Brookline Sch. Dist.*, 783 F. Supp. 701, 706 (D. Mass. 1992). "The Act's requirement of periodic and individualized assessments of each handicapped child evinces a recognition that children, particularly young children, develop quickly and that a placement decision that may have been appropriate a year [or less] ago may no longer be appropriate today." *Spiegler v. District of Columbia*, 866 F.2d 461, 466 (D.C. Cir. 1989).

D. There is no conflict with OSEP's letter rulings.

Petitioners take the further position that it is "significant" that OSEP "has also twice ruled that a 60 day statute of limitations is unenforceable under the IDEA." Pet. at 12. Those short letter rulings, commenting on proposed state legislation in two states, are inapposite. Petitioners' argument disregards the salient differences

between the facts responded to in the Raskin and Pawlisch letters, implicating a one-time, absolute and close-ended 60-day period, and the facts in Petitioners' cases, implicating no such restrictions.[6] A second problem is that the 1991 OSEP letter, on which the 1997

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[6] The Raskin letter (1991) (*see* Respondents' Appendix at 85a) commented on proposed legislation in New Hampshire which would have **limited** any request for due process to the period within 60 days **from "the date parents must sign** the documents indicating their assent to" IEPs. OSERS noted that such a restriction conflicted with IDEA's grant to parents of the right to contest "**any matter** relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child." OSERS rightly saw a conflict between the New Hampshire legislation and 20 U.S.C. § 1415(b)(1)(E) and 34 CFR § 300.506 "[s]ince we can envision many situations in which this 60-day limitation would not be reasonable, e.g., problems with the IEP that would not be apparent until much further into the school year."

There is absolutely no such conflict between IDEA, its regulations and the existing statutes in North Carolina, as N.C.G.S.§ 115C-116(c) gives parents the right to obtain review in due process of decisions with which they disagree at any time throughout the year, not just within 60 days of the finalization of a particular IEP. Unlike the proposed New Hampshire legislation, in North Carolina **all** decisions regarding identification, IEP content, IEP implementation, or other denial of appropriate education are grievable under § 115C-116(c), consistent with IDEA. The 60-day period begins to run anew in North Carolina **at any time** the district makes a final decision with which the parents disagree; the 60 days does **not** only begin to run at the time of a meeting for signing the IEP as under the New Hampshire statute.

The Pawlisch letter (1997) (*see* Respondents' Appendix at 89a) commented on proposed legislation in Wisconsin and observed merely that "OSEP previously indicated in a letter to Raskin, OSEP 1991, that a 60-day time limit in filing due process requests which had been proposed in New Hampshire would be an unreasonable limitation upon Federal law." The 1997 letter appears to overlook the peculiar features of the New Hampshire legislation which made it objectionable. In any event, there is nothing about OSEP's comments in either of these letters which suggests that the 60-day limitation as enacted and applied in North Carolina offends federal law or policies; and Petitioners have not shown otherwise.

letter relies without analysis, pre-dates the reauthorized IDEA.

An even more fundamental problem with any argument based on the Raskin and Pawlisch letters, however, is that federal courts do not defer to agency interpretation of federal law when the agency's interpretation would alter the express intent of Congress. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1817, 100 L. Ed. 2d 313, 324 (1988). An agency's interpretive guidance is "not controlling upon the courts by reason of their authority." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49, 58 (1986). Similarly, this Court has quite recently reiterated that an agency's letter ruling "has no claim to judicial deference" under the *Chevron* doctrine, where there is "no indication that Congress intended such a ruling to carry the force of law." *United States v. Mead Corp.*, 533 U.S. ___, ___, 121 S. Ct. 2164, 2168, ___ L. Ed. 2d ___, ___ (2001). Ill-founded or misguided agency notions must, then, yield to the well-grounded and better reasoned contrary judicial interpretation of legislative intent set out in the decision of the Fourth Circuit in these cases.

CONCLUSION

This Petition should be denied for failure to show an actual controversy and injury in fact of these Petitioners, whose cases have both been returned by the Fourth Circuit for trial.

In the alternative, this Court should find there is no conflict between the Fourth Circuit's decision and decisions of other circuits or this Court. The Fourth Circuit correctly decided that North Carolina has properly weighed all the relevant competing policies embodied in IDEA. The Fourth Circuit's ruling, upon a careful balancing of those different policy considerations, is consistent with the congressional goals of: mutual collaboration between schools and parents in the identification and evaluation of children and development of appropriate IEPs; provision of full information about, and preservation of, all procedural rights; and of prompt resolution of disputes regarding IEPs and educational programs, to ensure that young and rapidly developing children with special needs receive their statutorily guaranteed education when they can most benefit from it. Petitioners have not shown otherwise, and no countervailing concerns arise under the facts of this case.

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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July 23, 2001

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION

CIVIL NO. 1 :99CV3

M.E. and P.E., on their behalf and on behalf of their son, C.E.,	)	
Plaintiffs,	)	
Vs.	)	**MEMORANDUM AND ORDER**
THE BOARD OF EDUCATION FOR BUNCOMBE COUNTY, a/k/a BUNCOMBE COUNTY PUBLIC SCHOOLS,	)	
Defendant.	)	

THIS MATTER is before the Court on the parties' cross motions for summary judgment. For the reasons stated herein, the Court denies the Plaintiffs' motion and grants that of the Defendant.

I. PROCEDURAL HISTORY

ME and PE on behalf of CE, their autistic child, initiated this action pursuant to the Individuals with Disabilities

Education Act (IDEA), 20 U.S.C. §§ 1400, *et. seq.*[1] 20 U.S.C. § 1401 (a)(1)(A)(i). Plaintiffs claimed the Buncombe County Board of Education (County) denied a free appropriate public education (FAPE) to their child, as required by the IDEA. 20 U.S.C. § 1401(a)(18).[2] On October 10, 1998, Administrative Law Judge (ALJ) Beecher Gray found the Plaintiffs had failed to initiate a proceeding for a due process hearing during the 60-day statute of limitations prescribed by the North Carolina Administrative Procedure Act, N.C. (Gen. Stat. § 1 *50B-23.* Plaintiffs filed an administrative appeal and State Review Officer (SRO) J. Sherwood Dunham affirmed the ALJ's decision on December 3, 1998. Having exhausted their administrative remedies, the parents brought this action pursuant to the IDEA. 20 U.S.C. § 1415(e)(2).

II. STANDARD OF REVIEW

Section 1415(e)(2) of Title 20, United States Code, provides in pertinent part that in "any action brought under this [statute] the court shall receive the records of the administrative

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[1] The disorder of autism is defined as a "preoccupation with inner thoughts,...egocentric, subjective thinking lacking objectivity and connection with reality." ***Dorland's Medical Dictionary*** **(28th ed. 1994).**

[2] That section defines the term "free appropriate public education" as "special education and related services that- (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." The parties here have agreed that no hearing is necessary and that the matter may be determined on the basis of the motions.

The Supreme Court has held that a proper review of the state's determination requires a twofold inquiry. ***Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 201 (1982).** The district court must decide: (1) whether the State complied with the IDEA's procedural requirements in developing and implementing the Individualized Education Program (IEP) for the child at issue and (2) whether the IEP is "reasonably calculated" to enable that child to receive educational benefits. ***Id.*, at 206-07.** The Court also instructed reviewing courts to make "independent decision[s] based on a preponderance of the evidence." ***Id.*** The Fourth Circuit refined this standard in *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100 (4th Cir. 1991), where it held that findings of fact by ALJ's and hearing officers in IDEA cases "are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact finding, but not requiring it." ***Id*, at 105.** In essence, district courts must "'make an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings.'" ***Board of Educ. of Montgomery County v. Brett Y*, 155 F.3d 557 (table), 1998 WL 390553 **5 (4th Cir. 1998) (quoting *Doyle*, 953 F.2d at 103).** As to conclusions of law, the determinations made in the

administrative proceedings are reviewed *de novo*. ***Milford Sch. Dist. v. William F.*, 129 F.3d 1252 (table), 1997 WL 696108 (1st Cir. 1997); *Dell v. Bd. of Educ., Township High Sch. Dist.* 113, 32 F.3d 1053, 1058 (7th Cir. 1994).**

III. FINDINGS OF FACT

In August 1995, the Plaintiffs moved from Maryland to North Carolina. **Affidavit of Dr. Jane A. Stephens *contained in* Administrative Record.** In March 1996, PE contacted the County to advise that his four year old son had been diagnosed with autism and to request reimbursement for Lovaas[3] therapy which had been provided for the child in their home for between 35 and 40 hours per week. ***Id.*; Petitioners' First Prehearing Statement, *contained in* Administrative Record.** Dr. Stephens construed the letter as a referral for special education services and initiated the evaluation process, to which the Plaintiffs agreed. **Stephens Affidavit.** The parents signed a consent for the evaluation and were provided with a handbook on parental rights. ***Id.***

On May 31, 1996, a meeting was held with the Plaintiffs at which his proposed placement in a preschool classroom with

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[3] Dr. Ivar Lovaas developed a form of treatment for autistic preschoolers. "Discrete trial teaching (DTT) is one component of the Lovaas type of [applied behavioral analysis] and involves a directive followed rapidly with a consequence based on whether the student gives the correct response." ***TH* v. *Bd. of Educ. of Palatine Community Consol. Sch. Dist. 15*, 55 F.Supp.2d 830 (table), 1999 WL 342317 **14 n.8 (N.D. Ill. 1999).** Lovaas therapy requires one-on-one instruction, often for as much as 40 hours per week.

a TEACCH[4] special education teacher was explained. ***Id.*** The Plaintiffs rejected this placement and opted to continue the Lovaas program in their home. ***Id.*** In June 1996, the County offered to provide Extended School Year services to the child or to provide in-home services three times per week. ***Id.*** These services were also rejected by the Plaintiffs by letter dated July 26, 1996. ***Id.;*** **Petitioners' First Prehearing Statement,** ***supra.*** However, in September 1996, the Plaintiffs elected to receive limited services in the form of one and one-half hours of direct special education and speech therapy. **Stephens Affidavit**.

In October 1996, the Plaintiffs again asked the County to consider funding the child's Lovaas therapy. **Petitioners' First Prehearing Statement.** An IEP meeting was held in early January 1997 at which time the parents presented a draft IEP prepared at a Lovaas institution. ***Id.*** At a meeting held on January 28, 1997, the County proposed its IEP, made minor modifications as requested by the Plaintiffs and asked them to notify the County if the IEP was accepted because it would entail the hiring of additional staff. ***Id.*** In February 1997, the attorney for the County wrote to the Plaintiffs and again asked them to respond if they wished to implement the IEP. ***Id.*** No response was received to this letter. Plaintiffs admit that the IEP was never implemented because they rejected it. ***Id.***

Thereafter, the County sent the Plaintiffs an "Invitation to Conference" letter to discuss whether the child would be placed

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[4] Treatment and Education of Autistic and Related Communication Handicapped Children program.

in kindergarten. **Stephens Affidavit**. The Plaintiffs attended the meeting and asked that the child's record be sealed. ***Id.*** A follow-up meeting was set for June of 1997 at which time it was determined the child no longer needed special education services. ***Id.*** He was removed from the program and the parents were again provided with a copy of the Handbook for Parents' Rights. ***Id.*** On July 29, 1997, the Plaintiffs renewed their request for reimbursement for the Lovaas therapy and threatened to initiate a due process petition in the event a response was not received within ten days. ***Id.*** By letter of August 7, 1997, the County declined to reimburse the Plaintiffs for the full amount demanded and advised that a counteroffer could not be proposed until approval was received from the school board. ***Id.*** The County attorney wrote:

> Your letter states that we must respond to your offer within ten (10) days or you will proceed immediately to due process. You, of course, have the right to file a due process petition at any time, however, the reality of school systems requires that the governing board be consulted and that process takes time. If you proceed to due process, please be aware that the IDEA was reauthorized by Congress in June and the new law contains new notice provisions and provisions regarding attorneys' fees that are now in effect. I am including a copy of the law in order to provide you with notice of these provisions. In addition, the North Carolina General Assembly has amended the mediation provisions of state law and I have included a copy of that legislation.

Exhibit E, *attached to* Stephens Affidavit. The amendment to which the attorney referred concerned new notice provisions for filing a due process petition. The Plaintiffs filed a petition for due process in April 1998. ***Id.***

Stephen Grabenstein represented the Plaintiffs daring an undisclosed portion of these proceedings. He has acknowledged in an affidavit that he attended at least one IEP meeting with the Plaintiffs at which he was provided the Handbook of Parents' Rights. **Second Affidavit of Stephen J. Grabenstein, Esquire, *contained in* Administrative Record.** Inside the front cover of that book was placed an addendum which provided notification that a petition for a due process hearing must be filed within 60 days of written notice of the contested action. ***Id.***

IV. DISCUSSION

The only factual issue for resolution is whether the Plaintiffs have shown by a preponderance of the evidence that their petition for due process was timely filed. The first argument made by the Plaintiffs is that the County waived the 60-day statute of limitations. This argument is based on the language in the County attorney's letter to the effect that the Plaintiffs, "of course, have the right to file a due process petition at any time...." The entirety of the statement which is quoted above shows the attorney was responding to the Plaintiffs' threat to initiate a due process petition within ten days unless they had heard from the County. The attorney explained that the school board would not be able to approve any counteroffer within ten days and proceeded to provide

Plaintiffs with copies of the provisions concerning the filing of due process petitions. Plaintiffs' argument, based on taking the comment out of context, is disingenuous at best and is rejected.

As to the factual issue of whether the petition was filed within 60 days of the August 7, 1997 letter, the undersigned finds the determination of the ALJ and SRO was correct. Thus, the only issue remaining is the legal question of which statute of limitations should be applied. The IDEA provides that parents may request an administrative due process hearing but does not contain a time period within which to do so. **20 U.S.C. § 1415(b)(2).** The Fourth Circuit has determined that the absence of a limitations period in the Act does not mean no limitations period should apply to the IDEA. ***Manning* v. *Fairfax County Sch. Bd.*, 176 F.3d 235, 237 (4th Cir. 1999).** Indeed, when federal law provides no statute of limitations, "'the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, provided that the application of the state statute would not be inconsistent with underlying federal policies.'" ***Id.* (citing *Schimmel v. Spilane*, 819 F.2d 477, 482-83 (4th Cir. 1987) and quoting *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 240 (1985)).**

Plaintiffs argue that under the holdings of *Manning* and *Schimmel*, the 60-day period provided in the state Administrative Procedures Act is too short and may not be applied. However, Plaintiffs do not state which analogous state limitations period should apply. ***Dell*, 32 F.3d at 1059 ("Notably, however, [the Plaintiffs] do not suggest a**

particular statute more analogous to the IDEA's provisions that the court should borrow. Indeed, had the defendants pressed the point, they might well have been able to prevail solely on the ground that the [Plaintiffs] had waived the use of another statute of limitations by not having suggested affirmatively a particular limitation more appropriate than the one employed by the district court.").

In *Schimmel,* the Fourth Circuit addressed the question of the time within which an action in federal court pursuant to the IDEA should be commenced following the exhaustion of state administrative remedies. The defendant there urged the Circuit to find that Virginia's administrative procedures statute of limitations of 30 days should apply. However, the Circuit noted that many parents are unrepresented during the administrative proceedings and thus may be unable to retain an attorney and make a determination concerning the initiation of a federal action within the 30-day time frame. In response to the defendant's argument that the IDEA requires prompt resolution of such matters, the Court held "the need for speedy resolution of disputes does not outweigh the risk that a very short statute of limitations may deny parties a fair opportunity to obtain judicial review of adverse decisions rendered in administrative due process proceedings." ***Schimmel,* 819 F.2d at 483.**

In *Manning,* the issue was not the time within which to initiate the federal action but, as here, the time within which to petition for a due process hearing. The school did not argue that the Virginia administrative proceedings act applied but instead conceded the one year catch-all statute of limitations applied in

Schimmel was the appropriate one. Plaintiffs, on the other hand, argued that one year was too short a period in which to require parents to petition for a due process hearing and argued for a five year statute of limitations. Thus, the *Manning* court did not address whether the 30 day period in the Virginia administrative procedures act should have been applicable; it made a choice between a one and a five year statute of limitations. "[W]e are of the opinion that the same one-year limitations period is not so prohibitively short in the administrative hearing context that it undermines the IDEA's policy of providing parents an opportunity to protect their disabled children's educational rights." ***Manning*, 176 F.3d at 239.**

Thus, the undersigned rejects the Plaintiffs' argument that the *Manning* decision negates the application of North Carolina's 60-day limitations period pursuant to its Administrative Procedures Act. "A statute of limitations may apply no matter whether proceedings are brought in a judicial forum or in an administrative one." ***Manning*, 176 F.3d at 238.** The issue, then, is whether application of that 60-day period is "so prohibitively short in the administrative hearing context that it undermines the IDEA's policy of providing parents an opportunity to protect their disabled children's educational rights." ***Id.*, at 239.**

Although the *Schimmel* and *Manning* courts did not enumerate the balancing factors to be considered, each appears to have followed the methodology set out in *Amann v. Town of Stow*, 991 F.2d 929, 931-33 (1st Cir. 1993): the limitation

period to be borrowed should be selected after balancing the parental interest in participation, the school's interest in speedy resolution of disputes, and the child's interest in receiving educational entitlement. This case has an unusual posture because the child received the services his parents' deemed necessary; the issue is whether his parents are entitled to reimbursement. Moreover, the Plaintiffs, who rejected each proposed IEP, did not petition for a due process hearing until after the child had been determined to be ineligible for any services. Thus, the child's interest in receiving educational entitlement is not impacted.

However, the undersigned concludes that the school has a legitimate interest in the speedy resolution of disputes. The County on more than one occasion asked the Plaintiffs to advise whether they would accept the proposed IEP because acceptance would necessitate the hiring of additional staff. The inability of the school to ascertain the necessary expenditure of funds for staff impacts more than the Plaintiffs' child.

Moreover, although not dispositive, the parents here are not typical. The child's father is an attorney who purports to specialize in education law. They were represented during the proceedings and their attorney has admitted the receipt of information providing notice of the 60-day deadline. The parents were actively involved in the child's education, to the point of rejecting the IEP and insisting on the therapy of their choice.

It is compelling that this case does not involve the time within which to obtain judicial review of the state administrative proceedings. Although the IDEA instructs states to make a FAPE available, it has left to the states the procedural mechanisms for putting the same in place. It was thus within the ALJ's discretion to dismiss the petition as untimely under the North Carolina APA. ***L. M. v. Brownsburg Community Sch. Corp.*, 28 F.Supp.2d 1107, 1110 (S.D. Ind. 1998).** "Just as all deadlines throughout the administrative process are short, the review of that process also should take place within a short period of time." ***Dell*, 32 F.3d at 1061 (applying Illinois' 120-day time limitation for judicial review of administrative decision to parent's reimbursement claim under the IDEA.).** Thus, application of the North Carolina Administrative Procedures Act 60-day limitation is not inconsistent with the underlying policies of the IDEA.

> The purpose of requesting a due process hearing is to challenge an aspect of a child's education and to put the school district on notice of a perceived problem. Once the school district receives notice, it has the opportunity to address the alleged problem. Under [Plaintiffs'] theory, a school would be potentially liable for unanticipated costs for alleged problems of which it is totally unaware. "Recovery tuition [or costs] is a remedy only if the [FAPE] guarantee has been violated, exhaustive administrative remedies have been tried before placement, and the school has been notified."... While [the Lovaas therapy] may

> have been of great benefit to [the child], we cannot agree that a school district must reimburse a parent for unchecked educational expenses.

***Thompson v. Bd. of Special Sch. Dist. No. 1 (Minneapolis)*, 144 F.3d 574, 579 n. 3 (8th Cir. 1998) (quoting Cindy L. Skaruppa, Ann Boyer & Oliver Edwards, *Tuition Reimbursement for Parent's Unilateral Placement of Students in Private Institutions: Justified or Not?*, 114 Educ. Law Rep. 353, *354* (West 1997)).** The Plaintiffs here seek reimbursement for therapy which they unilaterally chose and implemented during a time when there were no proceedings pending with the County.

> We, of course, recognize that the school district has the duty in the first instance to provide an appropriate IEP, and moreover, to demonstrate by a preponderance at a due process hearing that the IEP it offered was indeed appropriate. With that foremost in mind, we must nevertheless also recognize that as a practical reality, and as a mater of procedural law of which [the child's] parents were fully apprized, the right of review contains a corresponding parental duty to unequivocally place in issue the appropriateness of an IEP. This is accomplished through the initiation of review proceedings within a reasonable time of the unilateral [choice of therapy] for which reimbursement is sought.

Bernardsvile Bd. of Educ. v. J.H., 42 F.3d 149, 158 (3rd Cir. 1994) (footnote omitted); *accord, Lewisville Indep. Sch. DisL v. Brooke P.*, 16 Educ. for the Handicapped Law Rep. 1313, 1315-16 (E.D. Tex. 1990) (parents' failure to request due process hearing constitutes waiver of right to reimbursement for cost of extended school year services prior to initiation of due process proceedings); *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3rd Cir. 1999). Thus, the undersigned cannot conclude that application of North Carolina's 60-day period is "so prohibitively short in the administrative hearing context that it undermines the IDEA's policy of providing parents an opportunity to protect their disabled children's educational rights." *Manning, supra.*

V. ORDER

IT IS, THEREFORE, ORDERED that the Plaintiffs' motion for summary judgment is hereby **DENIED**; and

IT IS FURTHER ORDERED that the Defendant's motion for summary judgment is hereby **GRANTED.**

A Judgment dismissing this case in its entirety is filed herewith.

THIS the 17th day of December, 1999.

/s/ LACY H. THORNBURG
UNITED STATES DISTRICT COURT
JUDGE

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
FILE NO. 98 EDC 0566

M. E. and her husband, P.E., individually, and on behalf of their son, C. E.,	)	
Petitioners,	)	
vs.	)	**FINAL DECISION**
THE BOARD OF EDUCATION FOR BUNCOMBE COUNTY a/k/a BUNCOMBE COUNTY PUBLIC SCHOOLS, et al	)	
Respondent.	)	

THIS CONTESTED CASE coming on for hearing before the Honorable Beecher R. Gray, Administrative Law Judge Presiding, on Respondent's *Motion for Summary Judgment* on September 14, 1998, in Hendersonville, North Carolina. After reviewing the pleadings, affidavits, and supporting memoranda of law and hearing the oral arguments of counsel, the Undersigned is of the opinion that the Respondent's *Motion* is well-founded in fact and law, and the Undersigned enters the

following Final Decision granting summary judgment in favor of the Respondent, Buncombe County Public Schools.

APPEARANCES

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ISSUES TO BE RESOLVED ON SUMMARY JUDGMENT

1. Whether the Petitioners' action is time barred by the applicable statute of limitations;

2. If not, whether the Petitioners fail to state a claim for which relief can be granted under the Individuals with Disabilities

Education Act ("IDEA") in that Petitioners sought public funding for a particular educational methodology; and

3. Whether this Court has jurisdiction to hear claims brought pursuant to the United States and North Carolina Constitutions, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1983.

BURDEN OF PROOF

Upon a motion for Summary Judgment the Movant has the burden of establishing that there is no genuine issue as to any material fact and that it is entitled to summary judgment as a matter of law. Once the Movant satisfies its burden, the Non-Movant may not rely on its allegations but must produce a forecast of evidence sufficient to establish the existence of a genuine issue of material fact requiring trial.

Based on the uncontroverted evidence appearing of record, to which consideration may be given under G.S. § 150B-(33)(3a), 26 N.C.A.C. 3 .0101(1) & 3 .0105(6), and G.S. § 1A-1, Rule 56 of the N.C. Rules of Civil Procedure, including pleadings, depositions, answers to interrogatories, together with affidavits, and having considered the legal memoranda and oral argument of counsel for both parties, the Undersigned, Administrative Law Judge Presiding, makes the following:

PROCEDURAL BACKGROUND

1. On August 27, 1998, the Respondent filed its Motion for Summary Judgment with supporting affidavits.

2. On September 2, 1998, the Respondent filed its *Brief in Support of Motion for Summary Judgment.*

3. On or about September 9 - 11, the Petitioners served affidavits and a *Brief* in opposition to Respondent's *Motion.*

4. On Monday, September 14, 1998, the Undersigned conducted an on-the-record hearing in the Henderson County Courthouse, Hendersonville, North Carolina.

5. The venue for this proceeding was suggested by the Petitioners and agreed to by the Respondent.

UNDISPUTED FACTS

1. M.E. and P.E. first presented their son C.E. to the Respondent in March of 1996 ("time of presentment"). At the time of presentment C.E. was four years old and was receiving an in-home program of Lovaas Therapy funded by the Petitioners.

2. On September 22, 1994 and September 23, 1994, C.E. was evaluated at the Kennedy Kreiger Institute and was diagnosed with Pervasive Developmental Disorder, not otherwise specified (PDD/NOS). The Kennedy Kreiger evaluation referred to C.E. as "high functioning".

3. On February 27, 1995, C.E. was evaluated by Division TEACCH in Chapel Hill, North Carolina. TEACCH determined that C.E. met the criteria for Autism.

4. On March 1, 1996, P.E. wrote to the Respondent "requesting reimbursement for CE's program which at that time was being privately funded by CE's family." Petitioners' First Prehearing Statement, Factual Allegations, ¶ 18. The letter describes C.E.'s in-home Lovaas program as "quite expensive to fund privately." Letter dated March 1, 1996, attached to Jane Stephens's Affidavit as Exhibit A.

5. The Respondent accepted P.E.'s letter of March 1, 1996 as a referral for special education and thereafter evaluated C.E., determined the extent of his eligibility for special services, developed numerous Individualized Education Plans (IEPs) for C.E., and offered a placement that it felt was appropriate to meet C.E.'s special needs. Although the Petitioners allege that the Respondent did not offer C.E. a free and appropriate public education, they never instituted proceedings available under the Individuals with Disabilities Education Act and G.S. 115C, Article 9 to challenge the educational program offered by the Respondent during the time period that C.E. was eligible to receive services under IDEA.

6. At the time of this hearing on the Respondent's *Motion*, neither expert witness for the Petitioners had reviewed any of the proposed services offered by the Respondent, and the Petitioners did not present additional affidavits at this hearing from these, or any other experts, opining that the program offered by the Respondent was inappropriate for C.E.

7. At no time did the parents accept the placement offered by the Respondent for C.E. electing to continue with their in-home Lovaas program. The Petitioners never requested that the

school system implement their program but only requested that the Respondent "fund" the Petitioners' program.

8. On October 23, 1996, P.E. wrote the Respondent "in an effort to get [the Respondent] to seriously consider the requests to fund CE's 'Lovaas' program'". Petitioners' First Prehearing Statement, Factual Allegations, ¶ 36. The letter also suggested that the Respondent contact its attorney for advice. Id.

9. On June 12, 1997, the Respondent reevaluated C.E. at the Petitioners request and determined that C.E. was no longer eligible for special education services under IDEA. The Petitioners consented to this decision.

10. On July 29, 1997, Petitioners wrote to the Respondent to "make one final attempt" to convince the Respondent to "reimburse" them for C.E.'s private, in-home Lovaas program provided to C.E. The letter concludes, "If you have not provided a written response to me within ten days from the date of this letter, we will immediately proceed to a due process hearing." Letter dated July 29, 1997 attached to Petition.

11. On August 7, 1997, Counsel for the Respondent wrote to the Petitioners on Respondent's behalf and rejected their request for the Respondent to fully reimburse them for the in-home Lovaas Program. The letter informed the Petitioners that the school system believed that the program offered to C.E. during his period of eligibility provided a free and appropriate public education and Counsel also informed the Petitioners of new notice requirements for filing due process under IDEA and provided them with a copy of the revised law.

12. On August 8, 1997, Counsel for the Respondent again wrote to the Petitioners on Respondent's behalf and again rejected the Petitioners' "final attempt" to receive "reimbursement" and made a counteroffer. The Petitioners never responded to this counteroffer.

13. According to the Affidavit of Petitioner M.E., on a number of occasions the Respondent provided either M.E. or her attorneys with copies of the Handbook on Parents' Rights with "July 1993" stamped on the front cover. The education record of C.E. indicates that either M.E. or P.E. acknowledged receipt of the Handbook on March 25, 1996 and June 12, 1997.

14. The Petitioner P.E. is also an attorney of record in this matter.

15. According to the Amended Affidavit of Jane Stephens, the Handbooks available to parents in 1996 and 1997 were the 1993 revised version and the 1994 version both of which inform parents of the sixty (60) day statute of limitations incorporated by G.S. §115C-116. The 1993 revised Handbook contains an Addendum inside the front cover or title page. That Addendum states as follows:

Addendum to July, 1993 Edition of Handbook on Parents' Rights.

The introduction and Part A of the section entitled "Impartial Due Process Hearing and State Review" (page 12) have been rewritten as follows:

Impartial Due Process Hearing and State Review. A parent or public agency may file a petition for an impartial due process hearing (sometimes called administrative review or contested case hearing) to challenge the identification, evaluation, evaluation, or placement of a child or the provision of a free appropriate public education for the child. This kind of hearing places the responsibility for resolving the conflict on an administrative law judge in the Office of Administrative Hearings, an agency that has no relationship with the education agency or with the State Department of Public Instruction.

A. In order to exercise the right to a due process hearing, the parent must file a petition within 60 days of written notice of the contested action with the Office of Administrative Hearings (424 N. Blount Street, P.O. Drawer 27447, Raleigh, N.C. 27611-7447. For additional information concerning the filing of a petition, parents should contact the Office of Administrative Hearings, telephone 919/733-2698.

16. According to the initial Affidavit of Stephen J. Grabenstein, Attorney for the Petitioners, he was given a copy of the 1993 Handbook at an IEP meeting that he attended on behalf of the Petitioners. The copy of the Handbook attached to the Affidavit did not include the Addendum.

17. According to a subsequent, revised affidavit of Stephen J. Grabenstein, he acknowledged that he received a copy of the 1993 Handbook with the Addendum from the Respondent at an IEP meeting.

18. The Petition in this matter was filed on April 22, 1998, two hundred and fifty-seven (257) days following the Respondent's final rejection of the Petitioners' request for full reimbursement on August 8, 1997.

CONCLUSIONS OF LAW

1. Although he is not held to a higher standard than the Petitioner M.E., the knowledge of facts held by P.E. as attorney is considered knowledge held by P.E. as Petitioner.

2. The Undersigned has jurisdiction over this matter pursuant to Chapter 115C and 150B of the North Carolina General Statutes and 20 U.S.C. § 1400 et. seq., the Individuals with Disabilities Act (IDEA).

3. Pursuant to G.S. §115C-116(c) the Undersigned does not have jurisdiction over Petitioner's claims made pursuant to the United States and North Carolina Constitutions, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1983.

4. Pursuant to 20 U.S.C. §1415 (1997) and 34 C.F.R. §300.504 & §300.505, written notice under IDEA is required only when an agency "proposes to initiate or change; or refuses to initiate or change; the identification, evaluation, or educational placement of the child, . . . or the provision of a free appropriate public education to the child" under the provisions of IDEA.

5. Upon the facts of this case, the Respondent was not required to provide the Petitioners with "prior written notice"

under IDEA in order for the applicable statute of limitations to begin running against Petitioners.

6. The applicable state law, N.C.G.S. §115C-116(d), clearly states that any administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B, the Administrative Procedures Act. Applied to this case, §150B-23 of the Act requires that, unless the federal or state law provides otherwise, the limitation for the filing of a petition is within sixty (60) days of notice of the contested action.

7. IDEA does not specify a time limit and G.S. §115C-116 specifically adopts the 60 day limitation. When §115C-116(d) and §150B-23 are read together, it is clear that the North Carolina statutory scheme strikes a necessary balance between the need for speedy resolution of special education disputes and the need to allow the parties a fair opportunity to obtain due process under state and federal law.

8. The Respondent provided the Petitioners with the requisite notice pursuant to §150B-23.

9. The April 22, 1998 Petition filed in this matter is not a timely challenge as to any action taken by the Respondent prior to the sixty (60) days of that date. Giving these Petitioners every reasonable inference from the evidence presented upon Respondent's *Motion for Summary Judgment*, the sixty (60) day statute ran over two hundred days prior to the filing of this Petition.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Respondent's *Motion for Summary Judgment* is hereby GRANTED and the Petition in this matter is hereby dismissed in it's entirety.

NOTICE

In order to appeal this Final Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Decision. G.S. §115C-116(h) and (I).

THIS the 30th day of September, 1998.

Beecher R. Gray
Administrative Law Judge Presiding

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STATE OF NORTH CAROLINA

BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO G.S. 115C-116

M.E. AND P.E. ON BEHALF OF THEIR SON C.E., Petitioner	)	
v.	)	**DECISION**
	)	**98 EDC 0566**
THE BOARD OF EDUCATION for Buncombe County a/k/a Buncombe County Public Schools, et al, Respondent	)	

This is an appeal of the following Final Decision, File No. 98 EDC 0566:

The order issued by Administrative Law Judge, Beecher R. Gray granting Summary Judgement in favor of the Respondent, Buncombe County Public Schools, 30 September 1998.

Case Records were received by the Review Officer on November 17, 1998. They included the Official Record, Judge Gray's Final Decision, transcripts of oral arguments, depositions, and numerous documents related to the substance of the contested case. On November 25, 1998, written

arguments were received from the Petitioner and the Respondent.

Having reviewed the records of the case, the Hearing Review Officer for the North Carolina State Board of Education finds the following;

FINDINGS OF FACT

1. A Petition for a Contested Case Hearing was filed on April 22, 1998 by M. E. on behalf of her son C. E. vs. the Buncombe County Board of Education.

2. On August 27, 1998, the Respondent filed a *Motion for Summary Judgement* with supporting affidavits.

3. On September 2, 1998, the Respondent filed its Brief in Support of Motion for Summary Judgement.

4. On or about September 9-11, 1998, the Petitioners filed a Brief with supporting affidavits in opposition to Respondent's Motion.

5. A Hearing was held before Administrative Law Judge, the Honorable Beecher Gray in the Hendersonville County Courthouse, Hendersonville, N. C. on Monday, September 14, 1998.

6. The Hearing was held pursuant to Chapter 115C and 115B of the North Carolina General Statutes, and the Individuals

with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et. seq.

7. The Petitioner for a Contested Case Hearing complained that the, "Respondent failed to provide FAPE."

8. The Respondent's *Brief in Support for Summary Judgement,* argued, in part, "the Petition is untimely."

9. C. E. (hereafter referred to as the child) was born January 10, 1992 in Maryland.

10. M. E. observed that at the age of 18 months the child, "wasn't speaking, he didn't make eye contact... he didn't play with toys."

11. The child was evaluated at the Kennedy Kreiger Institute on September 22, 1994 and September 24, 1994. He was diagnosed with Persuasive Developmental Disorder and evaluated as "high functioning". The child at that time was two and a half years in age.

12. Approximately five months later on February 27, 1995, the child was evaluated at the University of North Carolina, Chapel Hill. The University's Division TEACH concluded that the child suffered from Autism.

13. In August of 1995, the child and his family moved to North Carolina.

14. Before moving to North Carolina, M.E. had investigated the Lovaas program for the treatment of Autism, and had initiated the child's Lovaas therapy in early 1995.

15. On March 1, 1996, Paul L. Erickson, the child's father wrote to Dr. Jane Stephens, Director of Special Education, Buncombe County Public Schools. He stated, "We have been doing an in-home behavioral modification program with C. E.", and, "I am writing this letter to ask that you assist me in obtaining reimbursement for this in-home program."

16. On March 1, 1996, the child was four years old. North Carolina law requires that children with disabilities ages 3-20 be provided a free appropriate public education (FAPE). (Handbook on Parents' Rights Public Schools of North Carolina, 1997, p. 2)

17. The Respondent's agent, Dr. Stephens, initiated evaluation procedures to determine if the child met the criteria for special education services. M. E. consented to the evaluation and was provided with a copy of the Handbook on Parents' Rights.

18. At a meeting on May 31, 1996 attended by school personnel and the child's parents, it was determined that the child was eligible for special education services as a child with Autism. An Individualized Education Plan (IEP) was developed. The parents did not accept the plan.

19. On June 12, 1996, the Respondent offered to provide Extended School Year (ESY) sponsored by the Autism Society of North Carolina. The parents rejected the proposal.

20. On September 16, 1996, an IEP was signed by parents with the caveat added, "all rights reserved re. Lovaas."

21. On October 23, 1996, Mr. Erickson wrote the Respondent and requested reimbursement for the in-home Lovaas program and for the child's attendance at a private preschool.

22. Subsequent IEP meetings on January 6, 1997 and January 28, 1997 were conducted. The parents did not respond to the Respondent's suggestion that the IEP be implemented.

23. At the parents' request, the child was reevaluated. On June 12, 1997, the Respondent's IEP team determined the child no longer qualified for special education services. He was exited from the program.

24. On July 29, 1997, Paul L. Erickson, Esquire, wrote the Respondent's attorney, Ms. Cynthia Lopez, "to make one final attempt to convince you and your client to reimburse M.E.", for the child's in-home educational program.

25. In the July 29, 1997 letter, Mr. Erickson stated, "We are asking that your client agree to reimburse (M.E.) in the amount of $37,804.12 within ten days of the date you

receive this letter...". He concluded, "If you have not provided a written response to me within ten days from the date of this letter, we will immediately proceed to a due process hearing."

26. On August 7, 1997, the Respondent rejected Mr. Erickson's request for reimbursement for the in-home Lovaas program. The Respondent informed Mr. Erickson that the school system believed the program offered the child during his eligibility period satisfied all requirements of FAPE. The letter also contained a copy of the reauthorized IDEA, and the new notice provisions for filing a due process petition.

27. The following day, August 8, 1997, the Respondent's counsel wrote the Petitioners and rejected their request for reimbursement, but made a counter offer. The Petitioners did not respond.

28. Depositions of Petitioner's expert witnesses, Dr. Andrew L. Egel and Dr. Stephen L. Luce were taken on August 17-18, 1998. Neither expert had received any materials related to the program offered by the Respondent's school system in this case. Neither were prepared to testify as to the appropriateness of the Respondent's program for the child.

29. In the amended September 8, 1998 affidavit of Dr. Jane Stephens, she stated at least two copies of the Handbook on Parents' Rights had been provided to the Petitioners in this matter. The Handbooks were the 1993 version and the

1994 version. Both editions contained the same information concerning the sixty (60) day statute of limitations for filing a petition. (G.S. § 115C-116)

Impartial Due Process Hearing and State Review

A parent or public agency may file a petition for an impartial due process hearing (sometimes called administrative review or contested case hearing) to challenge the identification, evaluation, or placement of a child or the provision of a free appropriate public education for the child. This kind of hearing places the responsibility for resolving the conflict on an administrative law judge in the Office of Administrative Hearings, an agency that has no relationship with the education agency or with the State Department of Public Instruction.

A. In order to exercise the right to a due process hearing, the parent must file a petition within 60 days of written notice of the contested action with the Office of Administrative Hearings (424 N. Blount Street, P. 0. Drawer 27447, Raleigh, NC 27611-7447. For additional information concerning the filing of a petition, parents should contact the Office of Administrative Hearings, telephone 919/733-2698.

(Handbook on Parents' Rights, North Carolina Department of Public Instruction. 1993 Addendum; 1994, p. 12.)

30. In the September 8, 1998 affidavit of Petitioner M. E., she affirmed that copies of the Handbook were provided to

"me or my attorneys" on a number of occasions by representations of the Buncombe County Board of Education. The child's education record includes acknowledged receipt of the Handbook (1994, p. 12; 1997, p. 26-27) by either P. E. or M. E. on March 25, 1996 and June 12, 1997.

31. P. E. is also an attorney of record in this matter.

32. On September 8, 1998, Attorney Stephen J. Gabenstein revised his previous affidavit, and conceded he had received a 1993 copy of the Handbook which included information in the addendum about the sixty day statute of limitations.

33. Petition for a Contested Case Hearing was filed by M. E. on behalf of her son C. E., vs. the Buncombe County Board of Education, two hundred fifty seven (257) days after Respondent's August 8, 1997 rejection of the Petitioner's request for reimbursement.

34. At the September 14, 1998 Hearing, the Court ruled that Paul. L. Erickson be named a party in interest on the *Petition*. Mr. Erickson's law firm served as the Petitioner's counsel.

35. Mr. Erickson objected to being named a party. He argued, "If I am named a party, Your Honor, there is a case that says that I may not recover attorney's fees for my time..."

36. Counsel for Petitioners and the Respondent submitted Written Arguments on November 25, 1998.

37. Upon review to the Review Officer for the North Carolina State Board of Education, the issues to be decided were:

    1. Whether the Petitioners' action is time barred by the applicable statute of limitations;

    2. If not, whether the Petitioners fail to state a claim for which relief can be granted under the Individuals with Disabilities Education Act ("DEA") in that Petitioners sought public funding for a particular educational methodology; and

    3. Whether this Court has jurisdiction to hear claims brought pursuant to the United States and North Carolina Constitutions, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1983.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction with regard to this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and 20 U.S.C. § 1400 et. seq, the Individuals with Disabilities Education Act (IDEA).

2. The Court does not have jurisdiction over Petitioners' claims made pursuant to the Americans with Disabilities Act (ADA), the Constitution of the United States and the State of North Carolina, Section 504 of the Rehabilitation Act, Section 1983. (G.S. 115C-116(c), and Section 1983)

3. By letter dated November 9, 1998 and received November 19, 1998, the Director of the North Carolina Exceptional Children Division appointed the undersigned Review Officer to review the case.

4. The Review Officer has jurisdiction with regard to this case pursuant to Chapters 115C and 150B of the North Carolina Statutes and 20 U.S.C. § 1400 et. seq. (IDEA).

5. The procedures at the hearing were consistent with the requirements of due process. (N.C.G.S. 115C-116; Procedures Governing Programs and Services for Children with Special Needs, 1996; 20 U.S.C. § 1415; 34 C.F.R. 300.500 et. seq.)

6. The Respondent rejected the Petitioners' "final attempt" to receive "reimbursement" for the in-home Lovaas Program on August 8, 1997. The A.L.J. did not err in his decision that on August 8, 1997, the time limitation on the statute of limitations in this case began to run.

7. On April 22, 1998, the date on which the *Petition for a Contested Hearing* was filed, the child was not a child with a disability, and therefore did not meet the criteria for

special educational needs. The child was a child without disabilities on August 8, 1997.

8. The *Petition* complained that the "Respondent failed to provide FAPE." In this case, prior written notice by the Respondent, which could signal the time limitations on the statute of limitations to commence, is not required under IDEA. Written notice by the Respondent to the Petitioner is required only when the agency, "Proposes to initiate or change the identification, evaluation, or educational placement of the child on the provisions of FAPE, or refuses to initiate or change the identification, evaluation, or educational placement of the child on the provisions of FAPE (34 C.F.R. 300.504-505; 20 U.S.C. § 1415; G.S. 115C-115; Handbook on Parents' Rights; Procedures Governing Programs and Services for Children with Special

9. Since the child was a child without disabilities on August 8, 1997, and April 22, 1998, the Respondent was not required to provide the Petitioners with "prior written notice."

10. IDEA is silent on time limits imposed upon Petitioners when requesting a review of a contested case. Hence, State law prevails, N.C. G. S. 115C-116(d) states, "the administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B of the General Statutes, the Administrative Procedures Act." 150B-23(f) clearly states, "Unless another statute or a federal statute

on regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days."

11. The 60 day time limitation is stated in all copies of the Handbook on Parents' Rights provided to M.E. andP.E., and counsel, on numerous occasions by the respondent.

12. The time period between August 8, 1997, the date on which the statutes of limitations began to run, and April 22, 1998, when the Petitioners filed the Contested Case, without question exceeds the 60 day time limitation.

DISCUSSION

The issue in this Contested Case is, "Whether the Petitioners' action is time barred by the applicable statute of limitations."

The case is not about FAPE. It is not methodology, reimbursement, an I.E.P., Lovaas or TEACH, depositions or expert witnesses, or all other case law, exhibits, and arguments not related to "timeliness".

The undersigned Review Officer must decide:

What applicable North Carolina statutes govern the matters in this case?

N.C.G.S. 115C-116(d) directs the Court, Counsel, and Review Officer to the Administrative Procedures Act, 150B-23 for clarification. The APA establishes a 60 day limitation for the filing of a petition from the date of notice.

Was Notice provided by the Respondent which would trigger the statute of limitations?

Since the child on August 8, 1997, and March 30, 1998 was not a child with special educational needs, prior written notice under IDEA (1997) Section 615(b)(3) was not required. The August 8, 1997 letter from the Respondent which rejected Petitioners claims for reimbursement, satisfied the requirements of § 150B-23.

Were the Respondents and Counsel informed of their due process rights?

The Review Officer rules in the affirmati[ve]. The Handbook on Parents' Rights, which describes and explains the parents due process rights, was provided to M.E. and P.E., and their counsel on several verifiable occasions.

Was the March 30, 1998, Petition timely?

The Petition exceeded the 60 day APA limitation by 197 days.

Therefore, based on the Findings of Fact and Conclusions of Law, the Review Officer makes the following:

DECISION

The Administrative Law Judge did not err in deciding that the Respondents' *Motion for Summary Judgement* be granted.

NOTICE

Any party aggrieved by this Decision may institute a civil action in State court as provided by North Carolina Statutes 115G. 116 within 30 days after receipt of this decision.

This the 3rd day of December, 1998.

J. Sherwood Dunham
State Review Officer

STATE OF NORTH CAROLINA

BEFORE A STATE HEARING REVIEW OFFICER
FOR THE STATE BOARD OF EDUCATION
PURSUANT TO N.C.G.S. 115C -16

[PARENTS OF CM]	)	
Petitioners,	)	
	)	
v.	)	**DECISION**
	)	
HENDERSON COUNTY PUBLIC SCHOOLS	)	
	)	
Respondent.	)	

This is an appeal of the following Decision and Orders:

1. The December 11, 1997 Final Decision of the contested case heard by Administrative Law Judge, Meg Scott Phillips.

2. The Order issued March 24, 1997 by Chief Administrative Law Judge, Julian Mann, III. granting Partial Summary Judgment for the Respondent.

3. The Order issued March 24, 1997 by Chief Administrative Law Judge, Julian Mann, III. denying Petitioners' Motion for Sanctions for Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment.

Two cases, 96 EDC 0766 and 96 EDC 1708, involving common questions of **law and fact were** consolidated by Order of Chief Administrative Law Judge, Julian Mann, III on November 14, 1996. The case 96 EDC 0766 was incorporated in its entirety in case 96 EDC 1708.

The records of the case that were received included: nineteen (19) volumes of transcripts of the hearing; one (1) volume of the transcript of the hearing on motions; the Official Record of the case issued by the Office of Administrative Hearings, sets of exhibits from each of the parties; and additional written arguments submitted by both parties to the Review Officer. The Official Record contained the Final Decision of Judge Phipps, Orders of Chief Administrative Law Judge, Julian Mann, III, written arguments, and documents related to the procedures followed in the contested case.

Having reviewed the records of the case, the Hearing Review Officer for the State Board of Education finds makes the following:

FINDINGS OF FACT

1. A hearing on motions was held on February 27, 1997 by Chief Administrative Law Judge, Julian Mann, III. The nineteen day hearing in the contested case of [Parents of CM] v. Henderson Counter Public Schools was held on March 17, 18, 19, 20, 21, 24, 25, 26, 27 and April 3, 4, 5, 7, 8, 9, 10, 14, 15, 16 by Administrative Law Judge Meg Scott Phipps. All

hearings were held in Hendersonville, North Carolina. The hearings were held pursuant to Chapter 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et. sea.

2. The appeal of this contested case involved the provision of a free appropriate public education to C.M., who at the time of the hearing was 7 years old, having been born on January 10, 1990. (hereinafter C.M. will often be referred to as the child)

3. The Petitioners are the parents of the child, C.M., and are citizens and residents of Henderson County, North Carolina. (hereinafter the Petitioners will often be referred to as the parents)

4. The Respondent, Henderson County Public Schools, is a local education agency (LEA) receiving monies pursuant to the Individuals with Disabilities Act, 20 U.S.C. Section 1400 et seg. (IDEA), and is the agency responsible for providing special education to the child pursuant to North Carolina's Special Education Act, N.C.G.S. 115C, Article 9. (hereinafter the Respondent will often be referred to as the LEA or the school system)

5. The issues in the Petitioners' original petition for the contested case were:

a) Whether the Respondent failed to reimburse the Petitioners for the cost of an independent evaluation.

b) Whether the Respondent should be required to maintain the child in the Petitioners' private setting since the Respondent failed to offer a placement that would provide the child with a free appropriate public education.

c) Whether the Respondent should provide the child with compensatory education, due to the Respondent's failure to develop and appropriate IEP, and its ongoing failure to place her in an appropriate educational setting.

d) Whether the Respondent should reimburse Petitioners for the costs incurred in the Petitioners' private program.

6. Following Partial Summary Judgment granted to the Respondent and Orders issued by Chief Administrative Law Judge, Julian Mann, III on March 24, 1997, the issue for the Hearing before Administrative Law Judge Meg Scott Phipps was whether the program offered by the Respondent for the school year 1996-97 was appropriate for the child.

7. Upon appeal to the Review Officer for the State Board of Education, the issues to be decided were:

a) Whether the Chief Administrative Law Judge properly granted Partial Summary Judgment for the Respondent and thus foreclosed claims against the Respondent prior to the 1996-97 IEP.

b) Whether the Chief Administrative Law Judge properly denied Petitioners' Motions for Sanctions for

Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment.

c) Whether Administrative Law Judge Meg Scott Phipps erred in her Decision that the Respondent's proposed IEP for 1996-97 was appropriate.

8. On numerous occasions the Petitioners were provided a copy of the Handbook of Parent's Rights. As of May, 1995 and throughout the remainder of the proceedings of this case, the Petitioners were represented by counsel.

9. The child, C.M., was diagnosed with autism at approximately age two. During the 1992-93 school year, she attended a Montessori preschool in New Hampshire three days a week for three hours a day. She was accompanied to the class by an assistant who was not trained in autism.

10. Mr. William White, a psychologist with experience in autism, consulted monthly with the staff at the Montessori school to discuss C.M.'s autism and assist in her educational programming.

11. The Petitioners moved to Hendersonville, North Carolina in June 1993 in order to take advantage of services from the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) program. They learned of the TEACCH program by attending conferences on autism and researching available programs. They moved based on their understanding that TEACCH is a

nationally known program for autistic students and their families.

12. The TEACCH program, begun with support of the North Carolina legislature in 1972, is a comprehensive system that provides treatment, education and support for autistic children, adults and their families. TEACCH provides evaluations and consultation to school systems throughout North Carolina, the U.S. and the world.

13. The TEACCH philosophy focuses on using meaningful routines and visual clarity to teach autistic individuals to function independently. Through the use of structure and clarity, the autistic person is taught to understand concepts, work skills and expectations. The skills that are learned at the preschool level are built upon as the individual with autism grows older, leading to greater independence and adaptability in the classroom, home setting, group home, vocational or supported employment. settings. The TEACCH approach focuses on the student's strengths and on what children with autism personally find motivating or interesting and utilizes these in a creative manner to teach new skills.

14. In July 1993, C.M. was evaluated by Sloan Burgess at the TEACCH center in Asheville, North Carolina. Sloan Burgess had extensive experience working with individuals with autism. She conducts diagnostic evaluations, provides consultation to school systems, provides parent and professional training and organizes and conducts support groups for families. Ms. Burgess testified that during the testing C.M. showed areas of

substantial deficit in social relatedness. She displayed no functional language except for the word "no" but she babbled throughout the evaluation.

15. In August 1993, the Petitioners along with Sloan Burgess, met with school personnel to develop an IEP for C.M. The Petitioners, Ms. Burgess and school **personnel agreed** that C.M. should be served in the TEACCH preschool classroom which was just being developed at the Helping Hand Center, a private contracted program housed in one of the Respondent's schools. C.M.'s IEP called for her to be in a full day program specially designed for students with autism. This was the first time C.M. had been placed in a class specially designed for autistic students. A typical class day involved group time and individualized instruction for each student. C.M.'s IEP also called for two half-hour sessions of speech therapy weekly.

16. William White, the parents' previous consultant in New Hampshire, also advocated placement of C.M. in the Helping Hand TEACCH class. In a consultation report provided to school personnel in August 1993, he gave numerous suggestions. These were incorporated into C.M.'s IEP.

17. The Helping Hand classroom had a program of reverse mainstreaming wherein regular students would spend periods of time in the special class in order to provide opportunities for interaction with appropriately developing children. Two students in the special class were also mainstreamed for short periods of time each day. Ms. Arledge, the classroom teacher, and Ms. Burgess testified that in their opinion mainstreaming

was not appropriate for C.M. at the beginning of the school year, but it would have been an option later in the year if she gained enough skills to make it appropriate.

18. Although C.M.'s IEP called for a full-day program, the Petitioners only brought her for half day during most of the time she was enrolled.

19. Although the Petitioners dispute the fact, the record is clear C.M. was making some progress in the schools program in the Fall of 1993. Some language was beginning to emerge and C.M. was learning some skills. There also were no behavioral problems. It is also clear that the parents were not satisfied and were continuing their search for a program that they thought would be better for their child. The parents, however, did not voice their concern to school officials that they thought the program being provided for C.M. was not appropriate.

20. On November 23, 1993, the Petitioners removed C.M. from the Helping Hand classroom. In a letter of that date to the supervisor for Exceptional Children's program for the Respondent's schools, the father indicated there were two reasons for removing C.M. These were the published results of studies that the behavioral (Lovaas) approach is highly successful, and the Petitioners' belief that the Montessori classroom was the best placement for C.M. He did not express any discontent with the TEACCH program or infer that the program being provided by the Respondent was not appropriate.

21. Prior to the unilateral removal by the Petitioners, C.M. spent approximately three months in the Respondent's classroom, half-days for much of that time rather than full-days as specified in the IEP. Several creditable experts testified at the hearing that this was not a sufficient amount of time to judge the success of C.M.'s program in light of her age and her lack of prior enrollment in a structured classroom for students with autism.

22. The Petitioners had learned of the Lovaas program in October 1993 by reading a book by Catherine Maurice in which Ms. Maurice recounts the "recovery" of her two children from autism. After reading the book, in mid-October 1993, the Petitioners arranged for a Lovaas training workshop. The workshop was scheduled for December 1993. Shortly thereafter the Petitioners began the Lovaas program in their home, along with part-time enrollment in a private school. This program continues through the time of the contested case hearing.

23. The Lovaas program is described in program literature as a "treatment" approach that specializes in helping preschool children who are autistic and/or mildly to moderately retarded. The program uses behavioral techniques derived from the research of Dr. Ivar Lovaas of the UCLA Psychology Department conducted in the 1970's. The Lovaas research, published in 1987, claimed that 47% of the 19 subjects in his study achieved normal educational and intellectual functioning by 7 years of age. The program emphasizes discrete-trial teaching, involving the use of repeated verbal prompts to elicit specific verbal or behavioral responses. Positive reinforcers

such as candy, tickles and verbal praise are used to reward correct responses. Contingent aversive NO's spoken in a loud voice are used as negative reinforcers. Other negative consequences are delivered for unacceptable behavior.

24. Dr. Lovaas has established a for-profit center to provide Lovaas workshops, designed to help families set up treatment programs of their own. Through the workships, parents and staff members (recruited by the parents) are trained in the Lovaas method. Staff members are referred to as "therapists." They do not require **any special credentials** or previous experience to be fied qualified to be therapists. The Lovaas Clinic recommends dependable college students as good candidates. In addition to training the staff, the Lovaas program provides a UCLA consultant who visits the home site quarterly to monitor and advise regarding the program. The consultants may be graduate students or recent college graduates who have worked in the Clinic.

25. Although C.M. was no longer receiving special education services from the Respondent's schools following her unilateral removal from the school program, the Respondent agreed to continue to provide speech language services. In January 1994, an IEP meeting was held to develop a new speech IEP for C.M. and her speech service time was increased to two hours a week. The Petitioners have been satisfied with the speech services provided by the Respondent, which have continued through the time of the contested case hearing.

26. On December 21, 1993, the Petitioners began implementing the Lovaas program with C.M. for 20 hours a week. Initially, they were contracting with a consultant out of Chicago for the Lovaas program, for they could not get services directly from Dr. Lovaas' program at UCLA. They were on a waiting list with the UCLA program, and in August 1994 were able to drop the services of the Chicago consultant and contract for services with the UCLA program.

27. The Petitioners testified that they knew the Lovaas program was working for C.M. because she went from being nonverbal to using words within the first months of the program. The mother testified that C.M. was unable "to imitate a single thing" or to repeat any words "on command" prior to starting Lovaas. The records, however, of the speech therapist, Karen Perella, show that C.M. was able to both imitate motions and to say certain words in October and November 1993. Ms. Perella testified that C.M.'s language was emerging at that time prior to her beginning the Lovaas program.

28. In August 1994, as the Petitioners began working with the UCLA Lovaas program, C. M.'s therapy was increased to 40 hours a week and her amount of time in school decreased. The father met with Candy Priest, the special education supervisor for the Respondent, and requested a copy of C.M.'s student records. At that time, Ms. Priest informed the father that the school system could provide special education services to C.M. at her private school. The father declined the offer, indicating that he and his wife did not want the private school to know that C.M. had autism.

29. In December 1994, the father contacted Candy Priest to request that the school system begin paying for the Lovaas program. Ms. Priest indicated that it would be necessary for the parents and school personnel to meet to discuss C.M.'s educational needs and to determine an appropriate educational placement for her. In January and February 1995 the parents and school personnel held a series of meetings to develop an IEP for C.M.

30. While in the process of developing the IEP, Judy Cook, the Director of Exceptional Children's Programs, and Sharon Burlingame, a special education teacher, visited the Petitioners' home to observe the use of Lovaas therapy with C.M. Judy Cook testified that C.M. appeared very tired during the therapy and hit herself in the face several times out of apparent frustration and weariness .

31. On February 15, 1995, a final IEP meeting was held. At that time, the school based committee considered four possible programs for C.M.: the Helping Hand Classroom, Sharon Burlingame's classroom, the TEACCH classroom at Bruce Drysdale school and the Lovaas program. The committee recommended that C.M. be placed in a full-day program for autistic students at Bruce Drysdale school with some mainstreaming in a regular kindergarten classroom. The Petitioners continued to request that the school system pay for the Lovaas program. Judy Cook indicated in the meeting that it was her belief that the Lovaas program was too restrictive for C.M. and that the program offered by the school system was more appropriate. The parents pointed to the Lovaas study and

indicated that unless the school system could provide comparable data showing 47% of the students becoming indistinguishable from regular education students then they felt the Lovaas program was the best option. From testimony of the parents, it was clear that they thought their daughter could "recover" from autism.

32. The next day, February 16, Judy Cook sent the Petitioners a letter detailing the rationale behind the school-based committee's decision. Mrs. Cook enclosed a Parent's Rights Handbook and explained in the letter that the Petitioners could pursue a due process hearing in light of their disagreement with the school system's offer of services. No attempt was made by the parents to pursue the due process hearing, even though they disagreed with the Respondent's proposed program.

33. The Petitioners initially indicated in the spring of 1995 that they would like to pursue mediation with the school system over the placement decision. Although attempts were made to schedule a mediation, it never occurred. In May 1995, the Petitioners wrote to Judy Cook and stated that they had obtained representation by the Governor's Advocacy Council and that they were not available for mediation. The Petitioners never pursued mediation after that point.

34. At the end of June 1995, the Petitioners requested that the school system pay for an independent educational evaluation of C.M.. Because the most recent evaluation of C.M. was at that point over a year and a half old, Judy Cook requested that the school system be allowed to test C.M. first and that the

Petitioners could obtain an independent evaluation if they disagreed with the results of the school system's evaluation.

35. An evaluation of C.M. was conducted by school personnel in August and **September 1995.** In October 1995 the Petitioners and school personnel met to review the results of the evaluation. The mother requested that one portion of the testing be readministered. It was redone but the results did not markedly change.

36. Because the IEP offered by the schools in February 1995 and rejected by the parents was to expire in January 1996, school personnel invited the parents to meet in November 1995 to begin developing an new IEP. A school-based committee meeting was held in November and at that time school personnel presented to the Petitioners a draft IEP to begin the discussions. The Petitioners stated that C.M. had already mastered many of the proposed goals and objectives. Some time after the meeting, the Petitioners provided school personnel with a copy of the draft IEP that had been reviewed by Michael Guiou, their UCLA Lovaas consultant, and on which Mr. Guiou indicated many areas that C.M. had "mastered."

37. The concept that skills had been "mastered" was discussed at length during hearing. It is apparent that the Lovaas program uses the term "mastered" in a very unique fashion. If a child is successful in demonstrating the skill in the Lovaas therapy using discrete trial teaching (one-on-one), the skill is considered mastered. Extensive records were maintained by the

Petitioners regarding this "mastery." The record, however, clearly shows that C.M. could not perform many of those "mastered" skills in other environments, such as the school setting. Also, a significant discrepancy was noted between the performance of the child on standardized instruments used in evaluations and the parents records showing mastery. Many or the skills reported as "mastered" in the parents therapy records were not actually "mastered."

38. December 1995 the Petitioners renewed their request for an independent educational evaluation stating that the evaluation conducted by school personnel was insufficient. Judy Cook replied that the parents could pursue an independent evaluation and they would be reimbursed up to $1200 (the school system's maximum amount for independent evaluations).

39. On January 3, 1996 the Petitioners and school personnel jointly agreed to postpone the development of C.M.'s full IEP for the 1996-97 year until the independent evaluation was completed. C.M.'s speech therapy IEP was reviewed and services continued to be provided by Respondent.

40. Judy Cook provided the Petitioners with a list of licensed professionals in the area who could perform an independent evaluation. The Petitioners rejected all those listed, and informed Ms. Cook that they were obtaining an evaluation from outside the state. Ms. Cook again notified the parents of the $1,200 reimbursement limit for independent evaluations. From testimony of the Petitioners, it was apparent that they did

not want an unbiased evaluator to evaluate C.M. They clearly wanted an evaluator who had been involved with the Lovaas program and would favor that methodology.

41. In January 1996, long before the independent evaluation was complete, the Petitioners wrote to Michael Guiou, their Lovaas consultant, stating that C.M. will be attending a small private school next year with eight or nine children and that the teacher of the class would be working with C.M. over the summer.

42. In March 1996, Dr. Jan Handleman, an educator and professor in New Jersey, conducted an assessment of C.M. Dr. Handleman had prior experience with **the Lovaas program.** His assessment consisted of a review of C.M.'s file, a videotape provided by the Petitioners, and an observation of C.M. working with her Lovaas therapist. Dr. Handleman conducted no formal testing. The assessment, provided to school personnel in early April 1996, provided no information on C.M.'s present level of educational performance, a necessary element for the development of an IEP. The primary recommendation of Dr. Handleman's report was that C.M. continue to be served by the Petitioner's Lovaas program.

43. The Petitioners were reimbursed for a total of $1,200 for Dr. Handleman's assessment. The total cost, including related travel expenses, was alleged to be $2,648.21. The Petitioners provided no unique circumstances for such a high cost of the assessment, especially since many qualified local professionals could have performed the assessment for $1,200 or less. The

Respondent introduced evidence that there were numerous evaluators who could have performed the evaluation within this cost limit. Because of the Respondent's refusal to reimburse the full amount, the Petitioners filed their first Petition for a Contested Case Hearing on June 25, 1996. Initial proceedings for the case, 96 EDC 0766, were begun by Judge Mann. No. hearing was held in this initial case, for in the interim, the Petitioners filed a subsequent Petition for the case, for in the interim, the Petitioners filed a subseqquent Petition for the case, 96 EDC 1708, and asked for the cases to be consolidated. Judge Mann consolidated the two cases, including the initial case in its wntirety within 96 EDC 1708.

44. The parents and their Lovaas consultant, Mr. Guiou, had both indicated that C.M. had mastered many of the draft goals and objectives on the last proposed IEP, and this was inconsistent with the most recent testing that was done in August and September of 1995. School officials were expecting to obtain relevant information from Dr. Handleman's report. Such was not the case. Dr. Handleman's report was not sufficient to assist in IEP development. As a result, the school system sought the assistance of Dr. Victoria Shea, an expert in autism, to informally assess C.M. in order to provide information for IEP development.

45. The Petitioners agreed to Dr. Shea's involvement. Dr. Shea reviewed all of the records available on C.M. and observed her in both her home program and at her private school on May 20, 1996. Dr. Shea also observed in two public school classrooms that could possibly be used as placements for C.M. Dr. Shea

noted that C.M. was very compliant during the observation period but that she became quite confused when whe was not given prompts. C.M. did not initate any contact with her peers during the observation period at school. It appeared that C.M. had memorized some language but was unable to use that language functionally in many cases.

46. Dr. Shea recommended that IEP goals be written in several specific areas. In particular, C.M. needed work in developing independence and functional language. Self-help skills and academics should also be emphasized.

47. Although Mr. Guiou and the Petitioners indicated that C.M. had mastered numerous skills, C.M. was not able to perform those skills when Dr. Shea observed her. In light of the conflicting information regarding C.M.'s performance levels, Dr. Shea advised that C.M. should be given more assessments to gauge her present level of functioning.

48. The evidence showed that the skills that Mr. Guiou and the Petitioners claimed C.M. had "mastered" in February of 1996, were not mastered in the school environment as documented by C.M.'s teachers at the preschool in which she was then enrolled. The teachers, responding to a questionnaire from the mother, noted that many of the goals which had been proposed for C.M.'s IEP in November 1995 were either not attained or were emerging by May 1996. Mr. Guiou's report of C.M.'s mastery was not reliable. The evidence also showed that the skills claimed as "mastered" by Petitioners at the time of the hearing, were not "mastered" in the school environment or across all

settings but rather only mastered in the one-on one therapy environment. These inconsistencies caused the school system to question the evaluation information being provided by the Petitioners and it became even more important for school personnel to do additional observations or informal assessments in order to develop an IEP.

49. On May 29, 1996, Laurie McDanel and Janna Forst visited the Petitioners' home in order to observe C.M. in her Lovaas program. The purpose of the visit was to gather more information on C.M.'s present level of performance for the IEP development. Ms. McDanel testified that when she and Ms. Forst entered C.M.'s therapy room, C.M. did not look up or acknowledge their presence. She noted that the therapy appeared to elicit information from C.M.'s rote memory, rather than eliciting spontaneous communication. As a professional educator, Ms. McDanel believed the therapy to be too intense in light of the limited amount that C.M. was able to do during the time period.

50. In order to follow up on the visit, Ms. McDanel met again with the mother prior to the IEP meeting to discuss C.M.'s present level of performance and her needs. This information was used in developing the IEP.

51. An IEP meeting was scheduled for June 5, 1996. Following Dr. Shea's recommendation, Judy Cook requested that a teacher administer the Brigance test with C.M. prior to the meeting so that the IEP committee would have very current information on C.M.'s current level of academic functioning.

The Petitioners would not **agree to the administration** of the Brigance by school personnel and instead stated that they would have it done privately and requested that the IEP meeting be rescheduled.

52. In late July 1996, the Petitioners took C. M. to be evaluated by Dr. Thomas Boyle, a private psychologist in New Jersey who had worked with Dr. Lovaas. Dr. **Boyle conducted intelligence** and achievement testing with C.M. Dr. Boyle admitted in his report and in his testimony that he deviated from standard administration of the tests in several areas in order to try to elicit responses from C.M. He also acknowledged that these deviations from the norms could have resulted in inflating C. M.'s scores on the testing. At the parents' request, Dr. Boyle did not report C. M.'s IQ score in his evaluation report. Her IQ placed her in the mildly mentally handicapped range. Her achievement scores indicated that she was functioning at the beginning kindergarten level in math and reading. Dr. Boyle testified that C.M. needed lots of prompting during the testing and that sometimes he had to reword questions to elicit responses from her.

53. Dr. Boyle's report recommended continuation of the Lovaas program with C.M. including 15-20 hours of one-on-one discrete trial teaching. There was nothing in Dr. Boyle's testing results which would lead to the conclusion that the only appropriate program for C.M. would be the Lovaas therapy using discrete trial teaching or 15-20 hours of one-on-one.

54. The Petitioners also hired Dr. Jan Blacker, an education professor from California, to visit the Respondent's classrooms for autistic students and to observe C.M. in her home program. Dr. Blacker testified that her area of expertise is not autism. In her correspondence with the parents and prior to visiting the school system or having any contact with C.M., Dr. Blacker stated that she would do everything she could to assist them in getting funding for their home program. Dr. Blacker visited the classrooms in August 1996, however, none of the opinions or information gathered in Dr. Blacher's visit were shared with school personnel during the IEP development process in August and September 1996.

55. An IEP meeting was held on August 14, 1996. The Petitioners attended with their attorneys. At that time the committee began developing goals and objectives for the IEP based on the evaluation reports, the observations, and the parents' input regarding C.M.'s progress in her home program. The present level of performance in many areas of the IEP was based solely on parent report because no other information about C.M.'s skill levels was available.

56. At the time of the IEP meeting, the mother's monthly documentation in the home program noted that "C.M. has forgotten a lot of information. Much of what she learned was never generalized completely." The mother testified that she realized C.M. had not generalized skills after receiving Dr. Boyle's report.

57. After the August 14 meeting the Petitioners requested that another meeting be held in mid-September so that their Lovaas consultant, Michael Guiou, could attend and participate in the IEP development. A meeting was held on September 13, 1996, which the parents attended along with Mr. Guiou.

58. Ample evidence was admitted in the hearing through both testimony and exhibits that C.M.'s immediate needs, at the time of the IEP meeting, was the development of her social and communication skills. She also needed to become more independent and not have to rely so much on constant prompting by adults.

59. Despite the fact that C.M. was having significant behavior problems at home and in school at that time, the Petitioners did not share that information with school personnel. The mother also indicated that she could not recall if she had shared information on C.M.'s aggressive behaviors with Dr. Boyle and Dr. Handleman. Dr. Boyle testified that he had no information about C.M.'s behavioral status at the time of his evaluation. The Petitioners later criticized school personnel for not having created a behavioral management plan in the IEP, even though school personnel had no way of knowing C.M.'s behavior was a problem. Behavioral management plans are necessary components in the IEP only if the child's behavior interferes with the child's ability to participate in the educational program.

60. On September 23, 1996, a final IEP meeting was held. The Petitioners attended along with their attorneys. At that time,

both the parents and school personnel agreed that the goals and objectives on the IEP were appropriate. The committee then discussed possible placements for C.M. There was extensive discussion of her need for one-on-one instruction and her need for development of social and communication skills. The committee proposed that C.M. spend half of the school day in a regular kindergarten class with a one-on-one assistant; one hour a day working independently with monitoring in Laurie McDanel's classroom for autistic students, and one and a half hours a day receiving one-on-one instruction in academic areas in a separate room with Laurie McDanel. Ms. McDanel's class was structured according to the TEACCH model and consultative services were available from TEACCH. The IEP also called for three hours a week of speech services (two hours of direct services and one hour of consultation between the speech therapist and C.M.'s teachers).

61. The kindergarten time would be used to work on C.M.'s social skills and communication skills because in the classroom she would have opportunity for peer modeling and interaction. The one-on-one instruction could include some discrete trial teaching but would not be limited to that one method of instruction. In guided practice, C.M. would work in her specific work area in the classroom doing work that had been taught in the one-on-one setting.

62. Laurie McDanel's classroom has two teaching assistants, both of whom have been trained to work with autistic students. A primary goal in Ms. McDanel's classroom is to teach the students to work independently. Each student works

independently for part of the day. Data is kept by the teacher and teaching assistants as to how well the student is completing his or her individual work and progress is noted on the student's IEP. A daily anecdotal log is kept of the each mainstreamed student' s progress in the regular classroom.

63. Although there was agreement that the goals and objectives of the IEP were appropriate, the Petitioners rejected the placement offered by the Respondent. The Petitioners made it clear in the IEP meeting and later in testimony during the hearing that the only placement acceptable to them was in their Lovaas program. Their goal throughout the process was to obtain funding from the Respondent for their Lovaas program.

64. Following the IEP meeting and up to the time of the hearing, the Petitioners chose to maintain C.M. in their Lovaas program and half-day enrollment in a private school. The Lovaas program was being maintained for as much as 47 hours each week, including the discrete trial teaching, the private school program, peer play, and speech therapy. A Lovaas therapist accompanied C.M. at all times in the school setting for the purpose of providing the necessary prompts and to control behavior. The father testified that the total expected cost of the home program for the 1996-97 school year would be between $45,000-$50,000. Although the Petitioners rejected the placement offered by the Respondent, they chose to utilize the goals and objectives of the IEP in their program. Clearly they felt that the IEP was appropriate.

65. Following their rejection of the placement offered by the Respondent, the Petitioners filed a second Petition for a Contested Case Hearing on November 1, 1996.

66. In February 1998, just before the hearing, the Petitioners had C.M. reevaluated by Dr. Boyle. The testing showed that C.M.'s academics were still on beginning kindergarten level (as they had been during his testing eight months earlier). Although C.M. could decode words at the beginning second grade level she was completely unable to perform on the comprehension tests. In other words, she could read words at the beginning second grade level, but was unable to comprehend what she was reading. The IQ testing again showed C.M. to be functioning in the mild mentally handicapped range. Dr. Boyle also conducted some testing of C.M.'s expressive and receptive language. Comparing Dr. Boyle's results with the results of the testing done by the speech therapist in 1995, C.M. had made little progress, particularly in her receptive language.

67. Throughout the hearing before the ALJ, extensive testimony was given contrasting the methodology used in the Lovaas program with that used in the TEACCH program. More time was devoted to this issue than the primary issue to be decided, whether the Respondent offered a free appropriate public education to C.M.

68. Although the hearing was to focus on the appropriateness of **the 1996-97 IEP, extensive** testimony was given and exhibits entered that pertained to the the entire history of the

relationship between the Petitioners and Respondent. The Petitioner was able to enter, often over objections by the Respondent, a rather detailed record of C.M.'s education since 1993. Thus the Review Officer was able to get a relatively clear understanding of events and educational programming that technically had been foreclosed because the Partial Summary Judgment that was granted by Judge Mann on March 24, 1997.

69. Following the filing of the Petition for a Contested Case Hearing on November 1, 1996, extensive discovery proceedings ensued. The hearing was initially scheduled to begin on January 7, 1997. Several motions were made, continuances granted, and orders issued. The hearing was rescheduled several times.

70. On February 14, 1997, the Respondent filed a Motion for Summary Judgment. A Hearing on Motions was held by Judge Mann on February 27, 1997, following which Judge Mann granted partial summary judgment for the Respondent. As the time for the hearing was approaching and his ruling would have a definite impact on the proceedings, Judge Mann announced his ruling in a phone conference **with the parties** on March 5, 1997. He issued his formal Order on March 24, 1997.

71. In his February 27, 1997 Order, Judge Mann granted summary judgment for the Respondent regarding Petitioners alleged cost of an independent evaluation over and above the Respondent's payment of $1,200. This action effectively dismissed the original contested case that was filed June 25, 1996.

72. In his February 27, 1997 Order, Judge Mann also granted summary judgment for the Respondent on all of Petitioners' procedural and substantive claims prior to the development of the 1996-97 IEP. This action effectively limited the issue in the subsequent hearing to the appropriateness of the 1996-97 IEP.

73. As the hearing began on March 17, 1997, Judge Mann heard arguments related to Petitioners' Motions for Sanctions for Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment. Judge Mann denied these motions. A formal Order was issued on March 24, 1997.

74. The Orders of Judge Mann issued March 24, 1997 granting Partial Summary Judgment, denying Petitioners' Motions for Sanctions for Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment later became issues that were appealed.

75. By Order on March 17, 1997, following a hearing on Petitioners' motions, at 12:37 P.m Judge Mann reassigned the case to Judge Meg Scott Phipps. Judge Phipps conducted the remainder of the nineteen day hearing.

76. Following the hearing, Judge Phipps accepted Arguments and Proposed Findings of Fact and Conclusions of Law from both parties. Judge Phipps announced her decision by letter on November 19, 1997 and requested the Respondent's counsel to assist in preparing the final decision. Judge Phipps accepted the majority of the proposed findings and conclusions provided by

Respondent's counsel, and with minor editing and additions, issued her Final Decision on December 11, 1997.

77. Based on Findings of Fact and Conclusions of Law, the Decision of Judge Phipps favored the Respondent and included the following:

a. C.M.'s proposed IEP for the 1996-1997 school year was appropriate.

b. In order for the IEP to provide the maximum educational benefit to her, the one-on-one aide should be trained in the Lovaas method (discrete trial method) in order to assist C.M. in the transition to the public school system and the TEACCH program.

78. On December 20, 1997 the Petitioner filed Notice of Appeal with the State Superintendent of Public Instruction. For reasons not known, but possibly because of the Christmas holiday period, the request for review was not received in the Exceptional Children Division office until January 9, 1998. That office has responsibility for initiating the review.

79. By letter dated January 12, 1998, and received January 24, 1998, the State Superintendent of Public Instruction appointed the undersigned Review Officer to review the case.

80. On January 26, 1998, the Review Officer requested written arguments concerning the ALJ's Decision from both parties. As the 30 day time limit allotted for the review had already passed, the Review Officer also extended the time for completion of the

review. The review was to be completed within 30 days of receipt of case records. The records of the case were received from the Office of Administrative Hearings on January 30, 1998.

81. Counsel for both Petitioners and Respondent submitted written arguments on February 20, 1998.

Based on the Findings of Fact, the undersigned Review Officer makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Review Officer have jurisdiction with regard to this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and 20 U.S.C. §1400 et. sec., the Individuals with Disabilities Education Act (IDEA).

2. The Respondent is subject to the provisions of applicable federal and state laws, specifically 20 U.S.C. §1400 et. sec. (IDEA) and N.C.G.S. 115C, Article 9. These acts prohibit discrimination because of disabilities and require the Respondent to provide a free appropriate public education for those children in need of special education residing within the jurisdiction of the local educational agency (LEA). The Respondent is the LEA responsible for providing educational services in Henderson County.

3. The child, a resident of the LEA, is a child with a disability for the purposes of IDEA, 20 U.S.C. §1400 et. sea. and a child with special needs within the meaning of N.C.G.S. 115C, Article 9. Being classified as autistic, she is entitled to a free appropriate public education.

4. The due process requirements for parents and children of N.C.G.S. 115C116; Section .1517 of The State Procedures Governing Programs and Services for Children with Special Needs; 20 U.S.C. §1415; and 34 C.F.R. 300.500 et. sec,. were provided to Petitioner. This included provision of a Parent's Handbook to the Petitioners several times.

5. With regard to the partial summary judgment denying reimbursement for an independent evaluation, the Petitioners provided no unique circumstances that justified a reimbursement in excess of the reasonable limit set by the Respondent. The parents were indeed entitled to an independent evaluation of their child, at the expense of the schools, to assist in the provision of an appropriate education for their child. (34 C.F.R § 300.503) This was even acknowledged by the Director of the Exceptional Children's Program in a letter to the Petitioners. The reasonable limit of $1,500 was clearly communicated to the Petitioners prior to the parents choosing to go to New Jersey to obtain an independent evaluation. It is permissible for a school district to establish reasonable maximum allowable charges for independent evaluations, as long as the district provides advance notification of that limitation and gives parents an opportunity to demonstrate unique circumstances for exceeding that limit. The

sole reason for the Petitioners' choice of the psychologist in New Jersey is to utilize an examiner known to be favorable to their chosen methodology for teaching their child. This is not a unique circumstance.

6. The evaluation of a child for the purpose of determining the educational needs of that child is independent of a particular methodology that may be used in delivering the educational program to that child. Several licensed psychologists, with no affiliation with the school system or the TEACCH organization, were available in the region and in North Carolina. A list of available professionals was also provided to the Petitioners prior to their choosing the psychologist in New Jersey. These independent psychologists were capable of evaluating the child. The record is clear that they could and would have evaluated the child for a cost at or below the $1,200 limit established by the Respondent. The Petitioners argument that they are entitled to the excessive costs is without merit.

7. The partial summary judgment for the Respondent regarding the **appropriateness of the educational** program offered prior to the 1996-97 IEP was in accordance with established law in North Carolina. The 60 day deadline for filing for a contested case hearing is clearly spelled out in the Handbook on Parents' Rights, which had been provided to the Petitioners. It is unquestioned that the Petitioners unilaterally withdrew C.M. from the Respondent's program in November 1993. At that time they did not express any dissatisfaction with the program being offered with the Respondent. In the ensuing

period, up until November 1, 1996, the Respondent made offers of educational programs for C.M. on several occasions. In each instance, except for the acceptance of speech services, the Petitioners refused the IEP's offered by the Respondent. Although the record is clear that the Petitioners did not like the IEP's offered because their preferred methodology was not included, they never instituted proceedings available under IDEA and N.C.G.S. 115C, Article 9 to challenge the educational program offered by the Respondent. It was not until November 1, 1996, following the refusal of the 1996-97 IEP, that the Petitioners finally instituted these **proceedings.** Again, the Petitioners were well informed of their rights. They had **received the Handbook** on Parents' Rights. They were informed in letters from the Respondent of their rights. As of the Spring of 1995, the Petitioners were also represented by counsel. It is interesting to note that the parents initially filed a due process petition in June 1996, but only for reimbursement of excessive costs of an independent evaluation. It was not until November 1, 1996 that the parents filed a request for a hearing regarding the appropriateness of an educational program. That the parents chose not to timely exercise their rights to challenge programs offered between November 1993 and November 1996 does not allow them to now challenge those programs.

8. Judge Mann acted appropriately in granting summary judgment for the Respondent for any challenge to the education offered prior to the 1996-96 IEP. The applicable state law, N.C.G.S. §115C- 116(d), clearly states that any administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B, The Administrative Procedures Act.

Section 1508-23 of this Act requires that, unless another state federal statute sets a time limitation, the general limitation for the filing of a petition is within sixty (60) of the notice of the contested action. IDEA does not specify a time limit and the state laws specifically adopt the 60-day limitation. When §115C-116(d) and §1508-23 are read together, it is clear that the North Carolina statutory scheme strikes a necessary balance between the need for speedy resolution of special education disputes and the need to allow the parties a fair opportunity to obtain the due process afforded by state and federal law. Therefore, the petition filed November 1, 1996 is not a timely challenge to any action taken by the school system prior to sixty (60) days of that date. Judge Mann did not err in awarding summary judgment for the Respondent on this issue. See Glenn III v. Charlotte- Mecklenburg School Board of Education, 903 F.Supp. at 936 (W.D.N.C. 1995).

9. The Petitioners' argument that there were ongoing negotiations for over 22 months prior to their finally filing for the due process hearing, and that these negotiations should toll the time 60-day period for filing a petition is without merit. As the Petitioners were fully informed of their rights, and were represented by counsel during much of that time period, they had several opportunities to file a petition. They chose not to do so. Despite the allegations now being made by the Petitioners, there was no attempt to mislead the parents. The parents kept asking for funding of their **home-based Lovaas program,** continually rejecting any offer by the schools to provide a program within the school setting. If there was any misleading, it was possibly on the part of the parents. The record is clear -

the parents never intended to enroll C.M. in the school's program during this period, even though they participated in IEP meetings and communicated extensively with the schools. Any program, other than their homebased Lovaas program, was not even a possibility in their minds. Their sole purpose of "going through the motions" to have the Respondent design an educational program for their child was to obtain payment for their own program. That the Respondent may have been capable of furnishing an appropriate education for C.M. was not even considered by the Petitioners.

10. The request for the due process hearing on November 1, 1996 was timely for challenging the 1996-97 IEP, which was offered on September 23, 1996. Thus the focus of the hearing in this case was and should have been on the appropriateness of the education offered by the Respondent in this particular IEP.

11. The Petitioners had requested mediation in March 1995 but never followed through with scheduling the mediation. Although mediation between the parties is not required by IDEA or state law, it was available. The Respondent had scheduled mediation but it was canceled at the request of the Petitioners. The Petitioners made no effort to reschedule even though they indicated that they would do so.

12. Even though the summary judgment presumably restricted the hearing to the 1996-97 IEP, the AU and Review Officer in this contested case clearly have examined issues and events that occurred more than 60 days before filing the request for the hearing. Claims dating back to 1993 were allowed to be

introduced and have been examined by both the ALJ) and Review Officer. Thus the effect of the summary judgment was virtually nullified. Both the ALJ and the Review Officer had the opportunity to determine if the Respondent had failed to provide or offer a FAPE throughout the entire time period, 1993-1996. The ALJ, because of the summary judgment, did not have to make any decision pertaining to the time period 1993-1996. The Review Officer, after finding that the summary judgment was proper, also does not need to address the provision of FAPE during this time period. Because of the extensive evidence regarding this time period in the record, the Review Officer feels that a comment is in order. From the information entered in the record of this case, the Respondent made a convincing effort to offer a program for C.M. on several occasions. That the IEP's were usually not fully completed was often attributed to the failure of the parents to cooperate. Whether, or not those IEP's would have been appropriate is a moot point, for they were left incomplete. Certainly, the speech portion of the IEP's was appropriate, for they have been in effect and unchallenged since 1993. If there was a failing on the part of the Respondent, it was probably in the implementation of the first IEP in 1993. The 1993-94 IEP may never have been fully implemented in the Helping Hands classroom. This, however, became a moot point after the Petitioners unilaterally withdrew C.M. in November 1993, and did not file a petition for a hearing until November 1996.

13. The Order of Judge Mann denying Petitioners' Motion for Sanctions for an Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief

from Judgment was proper. Arguments of the Petitioners notwithstanding, there is nothing in the record that supports that Judge Mann clearly **abused** his discretion. The Petitioners' argument centered on the fact that several letters between Judy Cook and the parents were not mentioned and were missing from the affidavit. This could have easily been an oversight, for it is estimated that about 70 letters were exchanged between the parents and the schools. There was no evidence of "bad faith" as alleged by the Petitioners. These letters were not "newly discovered" evidence, for the Petitioners admitted to having constructive knowledge of the oversight and failed to raise the issue at the hearing on the motion for summary judgment. Also, failing to lisp these three letters in the affidavit did not have a significant effect on the information conveyed by the affidavit.

14. The Order of Judge Mann denying Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment was proper. Petitioners failed to file affidavits in a timely fashion prior to the hearing on the motion for summary judgment. Although these affidavits were not admitted by Judge Mann at the motions hearing, Judge Mann agreed to grant a continuance so that the Petitioners could file the affidavits. The Petitioners refused the continuance and thus were never able to have these affidavits considered. Because of the subsequent outcome of the motions hearing, the Petitioners regretted that the continuance was refused. This motion was an attempt to correct a tactical error committed by the Petitioners. Judge Mann did not abuse his discretion in denying the motion.

15. The issue before Judge Phipps in the 19 days of hearing was essentially as she stated in her conclusions: "At its core, the dispute is a debate over a choice of educational methodology for the teaching of autistic children. The two methods at issue are the Lovaas method and the TEACCH method."

16. The bulk of the testimony, and the exhibits, were irrelevant to the issue that had to be decided by Judge Phipps. She merely had to determine if the educational program offered by the Respondent in the September 23, 1996 IEP was appropriate.

17. It is the province of the school district and local educators, not that of the courts, to choose sound educational methods when implementing the provisions of IDEA. This concept is clearly enunciated in many decisions by the courts, including Board of Education v. Rowley, 458 U.S 176 (1982); artmann v. Loudon, 118F.3d 996 (4th Cir. 1997); Barnett v. Fairfax County School Board, 927 F.2d 146 (4th Cir. 1991); Lachman v. Illinois State Board of Education, 852 4.2d 290 (7th Cir.), cert denied, 488 U.S. 925 (1988), and Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989).

18. In the absence of procedural or substantive violations of law, courts will not order school authorities to implement a particular educational method when the school has chosen an appropriate educational method. In this particular case, the key is whether or not the Respondent offered an appropriate education. If the program that was offered was appropriate, neither the ALJ nor the Review Officer can substitute their

judgments for that of the school system. The hard and simple truth is, that if the Respondent has offered an appropriate program, there is no requirement to provide the method of the Petitioners' choice.

19. The Petitioners, in the tradition of the majority of concerned and interested parents, were seeking what they considered the "best" for their child. They should be commended for that effort. Indeed, ample evidence was introduced to show that C.M. did make progress through the: utilization of the parents' chosen methodology. The parents respect for the Lovaaa method as being the best for their child is neither disbelieved nor disregarded. 'The law, however, does not require that the public schools provide that which the parents consider the "best" or a "utopian" educational program for C.M. Both Federal and State law, instead, require that public schoolsprovide an "appropriate" education.

20. The educational program offered to C.M. in the 1996-97 IEP, though not the "best" in the minds of the parents, was appropriate. Under North Carolina Law, C.M. is entitled to "a fair and full opportunity to reach her full potential" (G.S. 115C-106), commensurate with that given other children. (Harrell v. Wilson County Schools, 58 N.C. App. 260, 1982) There is no requirement that a utopian educational program be provided for a handicapped child any more than the schools are required to provide a utopian program for the non-handicapped. (Harrell). This concept is even better understood since the Leandro case. In Leandro v. State of North Carolina, 346 N.C. 336 (1997), the North Carolina Supreme Court interpretedthe state constitution

to require that all children are entitled to and must have access to a "sound basic education." A "sound basic education" is one that prepares a child to participate and compete in the society in which she lives and works. Thus C.M. is entitled to an opportunity to reach her full potential commensurate with the opportunity given to other children - the opportunity to a sound basic education. In North Carolina, an appropriate education is nothing more than a sound basic education.

21. A free appropriate public education is defined in 34 C.F.R. § 300.8 as "special education and related services" that:

a. Are provided at public expense, under public supervision and direction, and without charge;

b. Meet the standards of the State Education Agency;

c. Include preschool, elementary school, or secondary school education in the state involved; and

d. Are provided in conformity with an IEP that meets the requirements of §§300.340 - 300.350.

22. In Board of Education V. Rowley, 458 U.S. 176 (1982), the Supreme Court defined appropriate to mean instruction specially designed to meet the unique needs of the handicapped child along with those supportive services that are necessary to permit the child to benefit. The guideline provided by the Court is clear. If the program is reasonably calculated to enable the child to benefit, then an appropriate education is being offered. According to the Court in Rowley, no guarantees regarding performance are established in the law. Instead, the intent of IDEA was more to open the door of public education to handicapped children by means of specialized education

services than to guarantee any particular substantive level of education.

23. Applying the North Carolina standard, there is no evidence that IEP developed for C.M. on September 23, 1996 did not offer a fair and full opportunity for C.M. to reach her full potential commensurate with that given other children. Likewise when applying the federal standard, there is no evidence that this IEP was not reasonably calculated to allow C.M. to benefit. Clearly, the Petitioners approved of all aspects of the IEP except for the methods to be used in delivering the educational program. As stated above, the choice of methodology is the province of the school district. Thus, it is clear that the Respondent offered a free appropriate public education for C.M.

24. Petitioners also contend that the placement of the child in the school district's program will cause the child to regress. They introduced no credible evidence to support this argument, and the testimony of the experts used in this case differed. The argument that regression "might" occur was not convincing. Speculation about a child's adjustment to a proposed program does not afford a basis of finding that the program is inappropriate.

25. Petitioners are not entitled to reimbursement for their educational program, nor are they entitled to any compensatory education, because the Respondent offered an appropriate educational program as defined in federal and state law.

Burlington School Committee v. Massachusetts Department of Education, 471 U.S. 359 (1985).

26. In sum, this Review Officer concludes that the Respondent has offered a free appropriate education for C.M. inasmuch as it has proposed a program that is reasonably calculated to enable her to receive educational benefit and offers her a fair and full opportunity to reach her full potential commensurate with that given other children. Nothing more is required by law.

Based on the Findings of Fact and the Conclusions of Law, the undersigned Review Officer for the North Carolina State Board of Education makes the following

DECISION

1. The Order of Chief Administrative Law Judge Julian Mann, III. on March 24, 1997 granting Partial Summary Judgment for the Respondent was proper.

2. Chief Administrative Law Judge Julian Mann, III. did not abuse his discretion in his Order issued March 24, 1997 that denied Petitioners' Motion for Sanctions for Affidavit Presented in Bad Faith and Petitioners' Motion for Reconsideration, Rehearing and Relief from Judgment.

3. Administrative Law Judge Meg Scott Phillips did not err in her Final Decision of December 11, 1997. The IEP proposed

by Respondent for the 1996-97 school year was appropriate. C.M. was offered a free appropriate education.

4. Administrative Law Judge Meg Scott Phillips also did not err in her Final Decision that the one-on-one aide utilized by the Respondent with C. M. should be trained in the discrete trial method of instruction in order to assist C.M. in the transition to the public school classroom.

NOTICE

Any party aggrieved by this decision may institute a civil action in State court within 30 days after receipt of this decision as provided in N.C.G.S. 115C-116 or file an action in federal court as provided in 20 U.S.C. §1415.

This the 3rd day of March, 1998.

Joe D. Walters
State Review Officer

CERTIFICATE OF SERVICE

I hereby certify that this decision has been duly served on the attorneys of record, the Office of Administrative Hearings, and the State Department of Public Instruction addressed as follows:

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This the 4th day of March, 1998.

/s/ Joe D. Walters
Review Officer

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U.S. DEPARTMENT OF EDUCATION
LETTER OPINIONS

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Digest of Inquiry
February 25, 1991

Does OSERS object to proposed state legislation which would set specific time limits on filing requests for due process hearings, appealing due process hearing decisions to court, and claiming attorneys' fees?

Digest of Response
June 19, 1991

Proposed Time Limits May be Unreasonable and Improper
Proposed state legislation which would establish specific time limits on filing requests for due process hearings, appealing due process hearing decisions in court, and claiming attorneys' fees may unreasonably burden the children with disabilities and their parents and may improperly limit the power of federal courts to hear cases under the IDEA.

Text of Response

This is in response to your recent request for clarification of the issues raised by a bill currently in the New Hampshire Legislature. The bill raises a number of questions related to whether the provisions in the proposed State legislation are consistent with the provisions of Part B. of the Individuals with Disabilities Education Act (Part B) and other Federal statutes.

The proposed bill currently before the New Hampshire legislature that you have asked the Office of Special Education and Rehabilitative Services (OSERS) to review includes a number of provisions which, if enacted, would impose limitations on parents' due process rights under Part B. Because the proposal would impose limitations on the due process rights guaranteed parents by Part B, as well as limitations on the authority of Federal courts, it would, if enacted, create a number of conflicts with Federal law. Our concerns with the various individual provisions of the proposal are as follows:

I. This paragraph would limit the filing of requests for due process hearings regarding individualized education programs (IEPs) to the 60-day period after the date parents must sign the documents indicating their assent to the IEP. Part B, however, grants parents the right to initiate due process on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," without any time limitation on when that right can be exercised. 20 U.S.C. § 1415(b)(1)(E);

34 CFR § 300.506. Since we can envision many situations in which this 60-day time limitation would be reasonable, e.g., problems with IEP that would not be apparent until much further into the school year, we believe this provision would conflict with Part B.

II. This paragraph, which would limit the period between a hearing officer's final decision and implementation of that decision to not more than 60 days unless pendency had attached or an extension was either mutually agreed upon or granted by the hearing officer, does not appear to be objectionable.

III. This paragraph would create a six-month statute of limitations for appeals to courts of due process hearing officer decisions. While a six-month statute of limitations may not be clearly unreasonable, we believe that this provision presents a conflict with Federal law because it would, by State statute, specifically attempt to limit the power of Federal courts to hear appeals of due process decisions when Federal law imposes no such limitation.

IV.(a) This paragraph would impose a six-month limitation for claims for attorneys' fees for work done in due process hearings, and a six-month limitation for filing lawsuits to recover attorneys' fees for due process for the reasons specified in III, above. With regard to the notice requirement, we are concerned that this provision may raise an additional unreasonable burden on parents' rights as specified in 20 U.S.C. § 1415(e)(4).

(b) This provision specifies that unless the parties agree in writing to the contrary, compliance with the hearing officer's decision and payment or settlement, or both, of attorneys' fees associated with that decision, constitutes agreement and settlement of all issues regarding the merits and fees between the parties. This provision does not appear to be objectionable.

V. This paragraph limits requests for due process and appeals of due process decisions to not more than six months after the end of the child's eligibility for service under Federal law. As specified in III and IV.(a), above, we cannot see that such limitation is clearly unreasonable, but believe that the provision presents a conflict with Federal law because of the limitation it imposes on the power of Federal courts.

We hope that this information is helpful. Please let me know if we can be of additional assistance. Thank you for bringing this matter to our attention.

Robert R. Davila
Assistant Secretary

U.S. DEPARTMENT OF EDUCATION
LETTER OPINIONS

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Digest of Inquiry
[Date Not Provided]

- Is a one-year statute of limitations for requesting due process hearings allowable?

Digest of Response
October 22, 1997

One-Year Statute of Limitations Permitted

Since the IDEA lacks a provision specifying a statute of limitations, courts most often borrow the most closely analogous state statute of limitations. In Wisconsin, a proposed statute required a written request for a due process hearing to be filed within one-year of the challenged action, provided the parents were made aware of the limitations period. OSEP stated a 60-day limitations period would be unreasonable, but the one-year period might be allowed. Before enacting the one-

year period, the state was directed to make sure the one-year limit was similar to the most closely related state statute of limitations, and to ensure that federal education claims were not subjected to a stricter statute of limitations than state claims.

Text of Response

The Office of Special Education Programs (OSEP) has completed its review of Wisconsin's 1997 Assembly Bill 261. The Bill provides that the written request for a hearing must be filed within one year after the proposal or refusal of the school board to initiate or change the child's multidisciplinary team evaluation, individualized education program, educational placement, or the provision of an appropriate special education program. The Bill also includes a propose additional, which states that the limitation period would apply only if the parent of a child with a disability received notice of the right to appeal.

Under current Wisconsin law, there is no specific limitation as to when a parent of a child with disabilities may file a written request with the Wisconsin Department of Public Instruction for a hearing to challenge the school board's proposal or refusal to initiate or change the child's multidisciplinary team evaluation, individualized education program, eduational placement, or the provision of an appropriate special education program.

The Individual with Disabilities Education Act does not impose

any time limitations. Under the Act, there is no statute of limitations for either requesting an administrative hearing or seeking judicial review. Although the Congress has created a federal statute of limitations for civil actions arising under Acts of Congress, its application is limited to laws enacted after 1990. 28 U.S.C. § 1658. However, OSEP previously indicated in a letter to Raskin, OSEP 1991, that a 60-day time limit for filing due process requests which had been proposed in New Hampshire would be an unreasonable limitation upon Federal law.

Traditionally, Courts have imposed analogous State statute of limitations on both requests for due process hearings and judicial appeals of those hearing decisions. Dell v. Bd. of Educ., Township High Sch. Dist. 113, 32 F.3d 1053 (7th Cir. 1994); Murphy v. Timberlane Regional Sch. Dist., 22 F.3d 1186, 1192-1194 (1st Cir., 1994); Oak Park and River Forest High Sch. Dist. v. Ill. St. Bd. of Educ., 886 F. Supp. 1417 (N.D.Ill. 1995) rev'd an other grounds. 79 F.3d 654 (7th Cir. 1996). One of the federal interests behind the borrowing of State limitations periods is to ensure that plaintiffs filing federal claims are not subjected to more stringent limitations than are imposed upon analogous State claims. See Wilson v. Garcia, 471 U.S. 261, 276 (1985).

While we are not aware of any case that specifically addresses the relevant statute of limitations in Wisconsin, in reviewing this legislation, the proposed one-year limitations period should be compared to the most analogous State statute of limitations for claims arising under State law. In enacting this limitation

period for IDEA due process hearings, the State should not discriminate against federal claims by making the statutes of limitations more restrictive for this federally protected right than for analogous State-based claims. Further, the application of such limitations in particular cases must be decided by impartial hearing officers and the Courts.

On August 20, 1997, a member of my staff, Ms. Barbara Route, spoke with Ms. Stephanie Petska of your staff, regarding the status of the Bill. Ms. Petska stated that the Bill was being reviewed by the Legislative Reference Bureau, an adjunct to the Legislature. Ms. Petska further stated that the Bureau would be notifying the Wisconsin Department of Public Instruction in October regarding the status of the Bill.

I hope the information in this letter will be of assistance to you. If you have additional questions and/or concerns, please do not hesitate to contact Ms. Route. State contact, at (202) 205-9029.

Thomas Hehir
Director
Office of Special Education Programs